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No. 84-468

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed September 22, 1984.
Certiorari Granted November 13, 1984.

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
November 26, 1980	Filed COMPLAINT AND Issued (6) SUMMONS.
January 11, 1982	Filed Plaintiffs' FIRST AMENDED COMPLAINT.
January 18, 1982	Filed DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER.
April 26, 1982	Court Trial.
July 28, 1982	Filed ORDER directing the parties to submit short letter briefs with the Court no later than August 12, 1982; a hearing on the issues is scheduled for August 13, 1982, at 11:00 a.m.
August 10, 1982	Filed ORDER OF DISMISSAL... that plaintiffs' pendent state claims in this action, as set forth in ¶ 35-37 and 40-42 of the First Amended Complaint are dismissed with prejudice to their refiling.
August 9, 1982	Filed STIPULATION OF VOLUNTARY DISMISSAL OF PLAINTIFFS' PENDENT STATE CLAIMS.
October 4, 1982	Filed MEMORANDUM OPINION — FINDINGS OF FACT AND CONCLUSIONS OF LAW.
October 4, 1982	Filed JUDGMENT . . . it is ORDERED and ADJUDGED that the Plaintiffs, Cleburne Living Center, Inc., et. al., take nothing and that the action be dismissed on the merits.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
October 22, 1982	Filed Plaintiffs' NOTICE OF APPEAL from the final judgment entered on October 4, 1982.
March 5, 1984	Judgment Entered by United States Court of Appeals for the Fifth Circuit.
March 19, 1984	Petition for Rehearing and Suggestion for Rehearing En Banc filed.
July 6, 1984	Petition for Rehearing and Suggestion for Rehearing En Banc Denied by United States Court of Appeals for the Fifth Circuit.
July 16, 1984	Mandate Issued by United States Court of Appeals for the Fifth Circuit.
August 16, 1984	Motion for Stay of Enforcement and/or Recall of Mandate filed.
August 27, 1984	Motion for Recall and Stay of the Issuance of the Mandate Granted by United States Court of Appeals for the Fifth Circuit.
September 7, 1984	Motion for Reconsideration of Order Recalling Mandate filed.
September 19, 1984	Motion for Reconsideration of Order Recalling Mandate Denied by United States Court of Appeals for the Fifth Circuit.
September 22, 1984	Petition for Writ of Certiorari filed.
November 13, 1984	Writ of Certiorari Granted.

[R. Vol. I, p. 64]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLEBURNE LIVING CENTER, INC., JAN HANNAH,
JOHNSON COUNTY ASSOCIATION FOR RETARDED CITIZENS,
and ADVOCACY, INC.,

Plaintiffs

vs.

CITY OF CLEBURNE, TEXAS, GEORGE W. MARTI,
Mayor of the City of Cleburne, Texas,
J. T. BASS, ARVAL MARTIN, JR., and ALFRED JOHNS,
members of the City Council of the
City of Cleburne, Texas, and JIM FERGUSON,
City Attorney of the City of Cleburne, Texas

Defendants

CIVIL ACTION NO. CA3-80-1576-F

FIRST AMENDED COMPLAINT

Introduction

1. This action is brought on behalf of a private corporation, an individual associated with that corporation, a private, non-profit organization devoted to the interests of mentally retarded citizens, and the Texas protection and advocacy system for the developmentally disabled against the City of Cleburne and certain of its officials who have acted to prevent the establishment and operation in the community of a family-like group home where mentally retarded citizens would live. The basis for the refusal of the city and its officials to permit the group home's operation is that its residents would be mentally retarded persons. Declaratory and injunctive relief are sought against the city officials, and declaratory, injunctive, monetary, and other forms of relief are sought against the city itself.

[R. Vol. I, p. 65]

Jurisdiction

2. This Court has jurisdiction over the federal claims (which arise under the Constitution and laws of the United States, including 42 U.S.C. § 1983) pursuant to 28 U.S.C. §§ 1331 and 1343(3)-(4) and 31 U.S.C. § 1244(a). The Court has pendent jurisdiction over the state claims, which arise from a nucleus of operative facts common to those giving rise to the federal claims. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201-02. The amount in controversy under 28 U.S.C. § 1331, exclusive of interest and costs, exceeds the value of $10,000. Venue lies in this district and division under 28 U.S.C. §§ 124(a) (1) and 1391(b).

Plaintiffs

3. Plaintiff Cleburne Living Center, Inc. (hereinafter sometimes referred to as CLC), is a small, three-shareholder corporation whose purpose is to establish and operate supervised group homes for mentally retarded citizens. It intends to lease a house at 201 Featherston Street in the City of Cleburne from Jan Hannah to establish a group home for thirteen mentally retarded adults at that address. Plaintiff CLC sues on its own behalf and on behalf of the mentally retarded individuals waiting to move into the Featherston Street group home. Plaintiff CLC is incorporated in the State of Texas and currently maintains an office at 112 East Walnut, Keene, Texas 76059.

4. Plaintiff Jan Hannah is CLC's Vice President and one of its three stockholders. She is the owner of the house at 201 Featherston Street in the City of Cleburne, having purchased it for the purpose of leasing it to CLC for the operation of a group home for mentally retarded citizens. She resides at Route 1, Box 453, Cleburne, Texas 76031.

5. Plaintiff Johnson County Association for Retarded Citizens (hereinafter sometimes referred to as Johnson County ARC) is a non-profit Texas corporation established to advocate for and represent the interests of the mentally

retarded residents of Johnson County. Among its approximately two hundred members are parents of retarded children and adults, mentally retarded persons, at least one of whom is a potential resident of the home, special education teachers and educational diagnosticians employed by the Cleburne Independent School District, [R. Vol. I, p. 66] and other concerned Johnson County residents. As an organization, it supports the establishment of group homes, including the Featherston Street one, for mentally retarded persons. It sues on behalf of mentally retarded persons who are the potential residents of the Featerston Street group home. Plaintiff Johnson County ARC maintains an office at 803 Rose Street, Cleburne, Texas 76031.

6. Plaintiff Advocacy, Inc., is a non-profit Texas corporation formed to protect the legal rights of persons who are developmentally disabled, including those who are mentally retarded. It is a statewide legal advocacy system affiliated with the State Bar of Texas and established pursuant to 42 U.S.C. § 6012. Among the rights for which Advocacy, Inc., advocates is the right of mentally retarded persons to live in group homes in community settings. It sues on behalf of mentally retarded persons who are the potential residents of the Featherston Street group home. Advocacy, Inc., has its office at 5555 North Lamar Boulevard, Suite K-109, Austin, Texas 78751.

Defendants

7. Defendant City of Cleburne is a municipal corporation established pursuant to the laws of the State of Texas. As a Texas municipal corporation, the defendant city has certain powers and duties, among which are certain zoning powers. The City of Cleburne receives substantial federal funds from the United States Department of Treasury, the United States Department of Health and Human Services, the United States Department of Housing and Urban Development, and other federal agencies. The City of Cleburne may be served with process at the offices of its mayor at 302 West Henderson Street, Cleburne, Texas 76031.

8. Defendant George W. Marti is the Mayor of the City of Cleburne. In conjunction with his duties as Mayor, he is the chairman and a voting member of the City of Cleburne City Council. The Mayor's office is located at 302 West Henderson Street, Cleburne, Texas 76031.

9. Defendants J. T. Bass, Arval Martin, Jr., and Alfred Johns are elected, voting members of the City of Cleburne City Council. Under Articles 1011 and 1011a of the Texas Revised Civil Statutes, the City Council is empowered to enact municipal zoning ordinances. The city council is also responsible for granting [R. Vol. I, p. 67] special use permits under the City of Cleburne Zoning Ordinance. The City Council offices of these council members are located at 302 West Henderson Street, Cleburne, Texas 76031.

10. Defendant Jim Ferguson is the City Attorney for the City of Cleburne. In his capacity as City Attorney, he is responsible for the prosecution of violations of the City of Cleburne Zoning Ordinance. His city office is located at 302 West Henderson Street, Cleburne, Texas 76031.

Factual Allegations

11. Plaintiff CLC is incorporated for the purpose of establishing and operating group homes for mentally retarded persons, many of whom are presently institutionalized in large, state-operated facilities housing hundreds of residents. CLC's goals for these people are to provide them with an opportunity to live in a family-like community setting which is more normal and less restrictive of their liberty than an institution and, ultimately, to provide them with the background and understanding necessary to permit them to live as fully and as independently of others as possible.

12. Mental retardation is *not* a disease and it is *not* a mental illness. Instead, it is an impairment in intellectual functioning and adaptive behavior which is often described as an educational problem. Despite their lower level of intellectual functioning, mentally retarded persons have the same hopes, the same fears, and the same feelings and

humanity as any other person. In short, they are full persons, worthy of the same basic respect and dignity accorded other persons.

13. Placement in more normal community settings can under appropriate supervision enable many mentally retarded persons to learn to participate in and contribute to community life. They can learn to cook, shop, manage a household, apply for and be productively employed in jobs, and use and enjoy community amenities such as parks, swimming pools, and libraries that all citizens may use and enjoy.

14. The fact that a person is mentally retarded in no way suggests that that person is dangerous.

15. The present three shareholders and officers of CLC had begun to consider forming a corporation for the purpose of establishing and operating a [R. Vol. I, p. 68] group home for the mentally retarded, and in late June or early July of 1980, they contacted the City of Cleburne and were informed that a special use permit would be required wherever in the city they chose to place the group home.

16. In late July, 1980, Plaintiff Jan Hannah purchased the lot and house at 201 Featherston Street in the City of Cleburne which is officially described as the north two thirds of lot 1, block 498. Jan Hannah then intended and still intends to lease the property to CLC to operate a group home for mentally retarded persons. A ten year lease has been executed, but the group home cannot begin operation until the zoning impediments have been removed.

17. The Featherston Street group home will house thirteen mentally retarded adults and will be operated as a Level I Intermediate Care Facility for the Mentally Retarded (hereinafter sometimes referred to as an ICF-MR) under extensive regulations and guidelines established and administered by the United States Department of Health and Human Services, the Texas Department of Human Resources, the Texas Department of

Mental Health and Mental Retardation, and the Texas Department of Health. It will comply with all applicable and valid statutes, regulations, codes, and ordinances.

18. The structure at 201 Featherston Street is a large, one story frame house containing a living room, an alcove, a dining room, a breakfast room, a kitchen, an attic, a laundry room, four bedrooms, a den, and two baths, with a half bath to be added. It is on a corner lot, and there are front, side, and back yards, as well as a large front porch. Across the street to the north of the Featherston home is a public junior high school which numbers among its students about thirty mentally retarded children between the ages of nine and twenty one years. Directly behind the Featherston home to the south is a two story apartment house. A dentist's office is on the corner northeast of the Featherston home.

19. The people who will live in the Featherston Street group home will be men and women eighteen years of age or older who are mildly or moderately mentally retarded. They will be completely ambulatory.

20. The Featherston Street group home will have twenty four hour supervision, divided basically into eight hour shifts. Besides handling administrative matters, some cooking, and some cleaning chores, the staff will work with the mentally retarded residents to train and teach them in such areas as kitchen management, maintenance, personal budgeting, meal preparation, academics [R. Vol. I, p. 69] related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities. The program for each resident will be flexible, depending on his or her needs, and will be based on an individual program plan prepared for each resident of the group home by an interdisciplinary team. Although a registered nurse will visit the home once a month, there will be no licensed nursing or medical staff in the home or employed by CLC. The residents will have jobs in the community and in a work activity center. They

probably will not have private automobiles. Their stay at the Featherston Street group home will be voluntary, and its length will be indeterminate.

21. The house at 201 Featherston is in a district classified as R-3 — an "[a]partment house district" — by the zoning ordinance of the City of Cleburne. Among the permitted uses in this R-3 zone are the following: apartment houses; multiple dwellings; boarding and lodging houses; fraternity or sorority houses and dormitories; apartment hotels; private clubs or fraternal orders; philanthropic or eleemosynary institutions; and "[h]ospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the ... feeble-minded ...*" (emphasis added). The City of Cleburne has classified the potential mentally retarded residents of the group home as "feeble-minded," and it has classified the use as a "hospital." Based on these classifications, the city required CLC to obtain a special use permit to operate the Featherston Street group home.

22. CLC will not use the Featherston Street group home as a hospital when it begins operating the ICF-MR.

23. Except for the fact that the residents of the home will be mentally retarded, CLC's contemplated use of the Featherston Street group home would be a permitted use under the City of Cleburne zoning ordinance and, consequently, would not require a special use permit.

24. During the first week of August, 1980, after being informed that a special use permit would be necessary to operate the group home at 201 Featherston, CLC paid forty dollars to initiate the special use permit application process.

25. On August 18, 1980, the City of Cleburne's Planning and Zoning Commission conducted a public hearing on CLC's special use permit application. Presentations in support of and in opposition to the permit were made. The [R. Vol. I, p. 70] majority of the arguments against granting the permit were based on the affirmatively stated proposition that the neighborhood around the Featherston Street

home should not have to put up with — to use the vernacular — "mentals." Immediately after the public discussion, the Planning and Zoning Commission voted to recommend that CLC's application for a specific use permit be denied.

26. The decision of the Planning and Zoning Commission to recommend that the special use permit not be granted was based upon an intent to discriminate against mentally retarded persons on the basis of their handicapping condition. Other purported bases for the decision — possibilities of flooding at the Featherston property, traffic concerns, and alleged inadequacy of space in the group home — are merely pretextual and wholly without factual foundation. Moreover, many of the pretextual bases for the recommendation are unrelated to the city's zoning powers. The expression by segments of the Cleburne community of their distaste for mentally retarded persons was the animating force in the Commission's recommendation.

27. On October 14, 1980, the City of Cleburne City Council held a public hearing on whether CLC's application for a special use permit for the Featherston Street group home should be granted or denied. Only one person from each side — those in support and those opposed — was permitted to speak. At the conclusion of the hearing, the City Council voted to deny the special use permit. J. T. Bass, Arval Martin, and Alfred Johns voted against the issuance of the permit. Dale Hannah voted for the issuance of the permit. George W. Marti, the Mayor, did not vote since he only votes in case of ties.

28. The decision of the City of Cleburne, expressed through its city council, and the votes of the three council members to deny CLC a special use permit for the Featherston Street group home was motivated by an intent to discriminate against mentally retarded persons on the basis of their handicapping condition. Any other purported basis for the decision is merely pretextual, without factual foundation, or outside the reach of the city's zoning powers.

29. The City of Cleburne Zoning Ordinance requirement in the first instance that CLC obtain a special use permit for the Featherston Street group home is, on its face, intentionally discriminatory against mentally retarded persons on the basis of their handicapping condition.

[R. Vol. I, p. 71]

Causes of Action

30. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 by acting and by failing to act under color of state law so as to exclude mentally retarded persons from living in a group home in the City of Cleburne based on their status as "mentally retarded" persons.

31. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) and 42 U.S.C. § 1983 by acting and by failing to act under color of state law so as to exclude mentally retarded persons from living in a group home in the City of Cleburne based solely on their status as "mentally retarded" persons. Section 504 provides:

> No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 706 defines the term "handicapped individual" to include mentally retarded persons. The City of Cleburne receives federal financial assistance.

32. Defendants have violated and continue to violate the rights of CLC and the potential residents of the Featherston Street group home under 31 U.S.C. §§ 1242(a) (1) and 1244 by using the city's zoning powers, programs, and

activities to subject them to discrimination on the basis of the mental retardation of the group home's potential residents.

33. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under the due process clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 by acting and by failing to act under color of state law irrationally and arbitrarily both in requiring a special use permit to operate the group home and in denying the special use permit when it was sought.

34. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, as well as the related [R. Vol. I, p. 72] constitutional right to travel, by acting and by failing to act under color of state law so as to prevent mentally retarded persons from freely choosing their place of residence and from freely associating with persons of their own choosing.

35. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under Section 7 of the Mentally Retarded Persons Act of 1977, TEX.REV.CIV.STAT. Art. 5547-300 (hereinafter sometimes referred to as the MRPA). Section 7 of the MRPA. reads:

> Every mentally retarded person shall have the right to live in the least restrictive setting appropriate to his individual needs and abilities. This includes the person's right to live in a variety of living situations, such as the right to live alone, in a group home, with a family, and in a supervised, protective environment.

By not permitting the operation of the group home, the defendants have denied mentally retarded persons the right to live in the least restrictive setting appropriate to their individual needs and abilities.

36. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under Article I, § 19, of the Texas Constitution by acting irrationally and arbitrarily both in requiring a special use permit to operate the group home and in denying the special use permit when it was sought.

37. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under Article I, § 3, of the Texas Constitution by denying mentally retarded persons rights equal to other similarly situated persons.

Relief

WHEREFORE, the plaintiffs pray that this Court grant the following relief to remedy the violations of the United States Constitution, federal law, the Texas Constitution, and state law described herein:

38. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate the Fourteenth Amendment's guarantee of due process and equal protection of the law and the First Amendment's guarantee of freedom of association and the related constitutional right to travel in that these provisions of the ordinance are facially discriminatory and have been discriminatorily applied to prevent the establishment and operation [R. Vol I, p. 73] of a group home in the City of Cleburne, Texas, and to exclude mentally retarded persons from living in the home, because of their status as "mentally retarded" persons.

39. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate Section 504 of the Rehabilitation Act's prohibition against discrimination based on handicap in that these provisions of the ordinance are facially discriminatory and have been discriminatorily applied to prevent the establishment and operation of a group home in the City of Cleburne,

Texas, and to exclude mentally retarded persons from living in the home, solely because of their status as "mentally retarded" persons.

40. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate Section 7 of the Texas Mentally Retarded Persons Act of 1977 in that they are facially invalid and have been applied to deprive mentally retarded persons of the right to live in the least restrictive setting appropriate to their individual needs and abilities.

41. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate Article I, § 19, of the Texas Constitution in that they are facially invalid and have been applied irrationally and arbitrarily, without any relation to the public's health, safety, welfare, or morals, so as to prevent mentally retarded persons from living in the Featherston Street group home in the City of Cleburne, Texas.

42. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate Article I, § 3, of the Texas Constitution in that they are facially invalid and have been applied to deprive mentally retarded persons of rights equal to those of other persons similarly situated.

43. Permanently enjoin the defendants from preventing or interfering in any way with CLC establishing and operating and the potential mentally retarded residents living in the home at 201 Featherston Street in Cleburne. This injunction would be based on the rights declared under Paragraphs 38-42, above.

44. Permanently enjoin the defendant City Attorney from prosecuting CLC for its operation and establishment of the Featherston Street group home.

45. On behalf of the plaintiff Cleburne Living Center, Inc., and the potential residents of the Featherston Street group home, permanently enjoin the [R. Vol. I, p. 74]

defendant City of Cleburne (and its officers, agents, employees, and assigns) from obligating, expending, and otherwise making use of any federal funds it receives pursuant to the State and Local Fiscal Assistance Act of 1972 (Public Law No. 92-512), as amended by Public Law Nos. 94-488 and 96-604, 31 U.S.C. § 1221 *et seq.* [hereinafter referred to as the Revenue Sharing Act]. In connection with this permanent injunction, the Court should order the repayment by the City of Cleburne to the federal government to all Revenue Sharing Act funds received by it since July 1, 1980, and should place all present and future payments to the City of Cleburne under the Revenue Sharing Act in escrow until the litigation is closed and the group home is permitted to operate.

46. On behalf of the plaintiff Jan Hannah, order the defendant City of Cleburne to pay her monetary damages equal to the rent she has lost on the Featherston Street home due to the defendant's illegal actions.

47. On behalf of the plaintiff Cleburne Living Center, Inc., order the defendant City of Cleburne to pay CLC monetary damages equal to the lost net profit it has foregone on the operation of the Featherston Street group home due to the defendant's illegal actions.

48. Order such other relief, including costs and attorney's fees pursuant to 42 U.S.C. § 1988 and 31 U.S.C. § 1244(e), as may be just and proper.

(Signature omitted in printing)

[R. Vol. I, p. 76]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION

No. CA 3-80-1576-F

CLEBURNE LIVING CENTER, INC., JAN HANNAH, JOHNSON COUNTY ASSOCIATION FOR RETARDED CITIZENS, and ADVOCACY, INC.,

Plaintiffs

vs.

CITY OF CLEBURNE, TEXAS, GEORGE W. MARTI, Mayor of the City of Cleburne, Texas; J. T. BASS, ARVAL MARTIN, JR., and ALFRED JOHNS, members of the City Council of the City of Cleburne, Texas; and JIM FERGUSON, City Attorney of the City of Cleburne, Texas

Defendants

DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now come the City of Cleburne, Texas, George W. Marti, Mayor of the City of Cleburne, Texas, J. T. Bass, Arval Martin, Jr. and Alfred Johns, members of the City Council of the City of Cleburne, Texas, and Jim Ferguson, City Attorney of the City of Cleburne, Texas, defendants in the above styled and numbered cause, and file this their First Amended Original Answer, and for such would show the Court as follows:

1.

Defendants have insufficient information to admit or deny the allegations contained in paragraph 1 of Plaintiffs'

Complaint as to the identification, interest and purposes of the plaintiffs, but the remainder of the allegations in paragraph 1 are denied.

[R. Vol. I, p. 77]

2.

These defendants deny that a cause of action exists of which the Court has jurisdiction as alleged in paragraph 2 of the Complaint and further deny that there is an amount in controversy under 28 U.S.C. §1331, exclusive of interest and costs, which exceeds $10,000.00, as alleged by plaintiffs.

3.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 3 of the Complaint.

4.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 4 of the Complaint.

5.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 5 of the Complaint.

6.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 6 of the Complaint.

7.

The allegations in paragraph 7 of the Complaint are admitted except the allegations with respect to federal funds, and in that connection, the defendants would show that the City of Cleburne has received no federal funds which have been used to pay the costs of exercising the zoning powers of the City of Cleburne.

8.

The allegations in paragraph 8 are admitted except that the Mayor of the City of Cleburne may only vote in the case of a tie and no tie existed in any voting process involving the subject property.

9.

The allegations in paragraph 9 of the Complaint are admitted.

[R. Vol. I, p. 78]

10.

The allegations in paragraph 10 of the Complaint are admitted, except that Jim Ferguson is no longer the City Attorney for the City of Cleburne, Texas.

11.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 11 of the Complaint.

12.

The allegations in paragraph 12 of the Complaint are admitted.

13.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 13 of the Complaint.

14.

The allegations in paragraph 14 of the Complaint are admitted.

15.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 15 of the Complaint.

16.

The defendants have insufficient information to admit or deny the allegations in paragraph 16 of the Complaint, except that they do admit plaintiffs could not start their business until the proper zoning has been granted.

17.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 17 of the Complaint.

[R. Vol. I, p. 79]

18.

The allegations in paragraph 18 of the Complaint are admitted.

19.

The defendants have insufficient information to admit or deny the allegations in paragraph 19 of the Complaint.

20.

The defendants have insufficient information to admit or deny the allegations in paragraph 20 of the Complaint.

21.

The defendants admit that the zoning ordinance of the City of Cleburne contains, among other provisions, the provisions quoted in paragraph 21 of the Complaint. The remainder of the allegations in paragraph 21 are denied.

22.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 22 of the Complaint.

23.

The allegations of paragraph 23 of the Complaint are denied.

24.

The defendants admit that plaintiffs paid the fee required to file their application for the zoning change they requested which is alleged in paragraph 24 of the Complaint.

25.

The defendants admit that the Planning and Zoning Commission voted to recommend that CLC's application for a special use permit be denied on August 18, 1980, at a public hearing, and the presentations in support of and in opposition to the permit were made. The remainder of the allegations in paragraph 25 are denied.

[R. Vol. I, p. 80]

26.

The allegations contained in paragraph 26 of the Complaint are denied.

27.

The allegations in paragraph 27 of the Complaint are admitted except that it is denied that only one person from each side was permitted to speak. In this connection, defendants would show that although they recommend that one person from each side speak, if that person can present the interest of the entire group, no person was denied the right to speak in this hearing and the City has no rule which requires that only one person can speak where it is necessary for more than one to speak in order to fairly present the petitions.

28.

The allegations contained in paragraph 28 of the Complaint are denied.

29.

The allegations contained in paragraph 29 of the Complaint are denied.

30.

The allegations contained in paragraph 30 of the Complaint are denied.

31.

The allegations contained in the first sentence of paragraph 31 are denied. Defendants admit that Section 504 of the Rehabilitation Act of 1973 includes the quoted provisions in the second sentence of paragraph 31. While the defendants admit that the City of Cleburne received federal funds, as alleged in the last sentence of paragraph 31, the defendants deny that the City receives federal funds which are used to finance the exercise of its zoning powers.

[R. Vol. I, p. 81]

32.

The allegations contained in paragraph 32 of the Complaint are denied and in this regard the City specifically denies that any federal funds received pursuant to the Revenue Sharing Act are used to finance the exercise of its zoning power and, it is therefore excepted from a cause of action brought pursuant to 31 U.S.C. 1242 and 1244.

33.

The allegations contained in paragraph 33 of the Complaint are denied.

34.

The allegations contained in paragraph 34 of the Complaint are denied.

35.

The allegations contained in paragraph 35 of the Complaint are denied.

36.

The allegations contained in paragraph 36 of the Complaint are denied.

37.

The allegations contained in paragraph 37 of the Complaint are denied.

38.

The defendants deny that the plaintiffs are entitled to any of the relief requested in their prayer.

39.

The defendants would show that the City Council and the Planning Commission of the City of Cleburne are each legislative bodies and that the members of said bodies at all times pertinent hereto acted with reasonable good faith and, therefore, they are immune to any claim for money damages.

[R. Vol. I, p. 82]

40.

Defendant Jim Ferguson, as alleged by plaintiffs, was the City Attorney of the City of Cleburne and, therefore, is immune to any claim or claims for money damages. The present City Attorney is also immune to any claim for money damages.

41.

The defendants would show that Plaintiff Advocacy, Inc. is federally funded pursuant to the provisions of 42 U.S.C. 6012 for the sole purpose of protecting and advocating the rights of "persons with developmental disabilities". As such, Advocacy, Inc. has no authority to bring an action on behalf of Jan Hannah and the CLC in an action for damages under 42 U.S.C. 1983, since Jan Hannah and the CLC do not qualify as "developmentary disabled persons".

42.

The defendants would show that Jan Hannah and the Cleburne Living Center do not have a cause of action for damages pursuant to the provisions of the Rehabilitation

Act of 1973 (29 U.S.C. 794) or the Revenue Sharing Act (31 U.S.C. 1242) whose remedies are exclusive in nature and do not include damages.

43.

These defendants would show that Plaintiffs Jan Hannah and the Cleburne Living Center have failed to state a cause of action that would entitle them to damages pursuant to the provisions of 42 U.S.C. 1983 or 29 U.S.C. 794, of which this Court has jurisdiction.

44.

These defendants would show that, as prevailing parties in this cause, in accordance with 42 U.S.C. 1988, said defendants, by way of affirmative relief, seek recovery of attorney [R. Vol. I, p. 83] fees in a reasonable amount as part of their costs.

WHEREFORE, these defendants respectfully pray that all relief sought by plaintiffs be denied, that the cause be dismissed and that these defendants be awarded court costs and attorney fees.

(Signature and Certificate of Service omitted in printing)

EXCERPTS FROM THE TRANSCRIPT

(Excerpts from testimony of J. T. Bass, petitioner)

[12] Q. Well, what is mental retardation?

A. I don't know.

Q. Did you know at the time?

[13] A. No.

Q. Did you make any effort to find out?

A. No.

Q. Before your vote?

A. No.

Q. Do you know now?

A. No.

Q. Have you learned any more about mental retardation since your vote?

A. Very little, if any.

* * *

[17] A. No. I took a look at the property before — I went out there, and I didn't think it was adequate for the use it was intended.

Q. What about the property made it inadequate?

[18] A. Well, very little yard space, no recreation facilities. And the fact that it was an old house.

* * *

[28] Q. And insofar as the location is concerned, if it's in a proper location and in a facility that is adequate, you have no objection to it; is that right?

A. No objections.

* * *

(Excerpts from testimony of Alfred Johns, petitioner)

[30] Q. Can you tell me why you voted against it?

A. Several reasons. One was the location I didn't think it was appropriate. Two was because of the petition that had been presented to the Council; three—number three, I didn't think that the property was large enough for it; and number four was because the question that Mr. Bass had asked was not answered.

Q. What question was that?

A. The responsibility for the retarded people that [31] would be there.

Q. What did you take—In your own mind, what did that word "responsibility" mean to you?

A. Who was responsible for the people that would be housed there.

Q. Responsible in what way?

A. Every way.

* * *

[33] A. In my opinion, I didn't think it was in the right location.

Q. What about the location made it inappropriate?

A. In Cleburne, in our zoning, we have zones for separate and different types of buildings and businesses and what not. We try to keep them located separately. One thing, that it was right across the street from the junior high school I didn't think was appropriate.

Q. Why was that a problem?

A. Well, one reason, knowing kids, children are going to be children and they're going to do and say things that I don't think would be appropriate.

Q. Do and say things to who?

A. Well, I'm under the impression we're talking about retarded people.

Q. Are you talking about what the junior high school students would do in regards —

A. I said may do. I didn't say would, I said may do.

* * *

[34] A. As I before mentioned, I don't think the property is large enough to afford recreation for thirteen people or whatever amount that they were going to have.

* * *

[35] Q. You at one time were on the board of directors of the C. C. Cook Developmental Center, I believe it's called?

A. Retardation School.

Q. Is that correct?

A. Yes, I was.

Q. How long were you on that board?

A. Three years.

* * *

Q. Did you meet any of the people that were working [36] there? Any of the mentally retarded people?

A. Any of the mentally retarded people that were working there?

Q. Yes.

A. I met some of the instructors. But they weren't mentally retarded.

Q. You didn't ever meet any of the people that worked there that were being instructed?

A. I can't say that I did. I know some people that attended, but I don't remember meeting any instructors.

Q. Do you know what mental retardation is?

A. Technically speaking, no.

Q. Well, what's your idea of what it is?

A. Technically speaking, I don't — I don't know. I'm not a doctor and I'm not a lawyer.

Q. Well, I'm not speaking technically. I'm asking you what your idea of what mental retardation is?

A. I would rather not guess, because I don't know.

[37] A. I don't think you would use the word "mentally retarded" if they weren't different from you.

Q. Well, what difference do you see?

A. I really don't know. I would say mentally unbalanced or something of that nature. I don't know what it means. I'm not a doctor.

* * *

[38] Q. Mr. Johns, do you recall approximately how many people were going to live — proposed to live in this facility; that is, mentally retarded adults? How many?

A. If I'm not mistaken, it was thirteen.

Q. Plus some staff members?

A. Plus the staff members.

Q. And in connection with city planning and zoning, tell the Court whether or not one of the things that you take into consideration is whether or not people can get to and from their home at all times? Is that important?

[39] A. That definitely is important. The traffic.

Q. In regard to the particular location that was involved in this case, tell the Court whether or not there were any floodplain problems connected with it?

A. There was definitely a — if I'm not mistaken, I believe it was something like five hundred year floodplain in this area.

Q. And in that — that flood that comes every now and then, this facility was located so that the people could not get to or from it?

A. That's true.

Q. And is that an important consideration to you for people who are — who may be mentally retarded?

A. It definitely is, Mr. Luna. That would be a concern to me for the citizens of the City of Cleburne period.

Q. Now, for the purpose of our record, Mr. Johns, you are a black American, are you not, sir?

A. Right, sir.

Q. And would you tell us whether or not in casting this vote you had in mind discriminating against anybody for any purpose?

A. I definitely did not.

• • •

(Excerpts from testimony of Arval Martin, petitioner)

[41] Q. What were the reasons that you voted against it?

A. Well, it would be like these other gentlemen. It was a two hundred feet area that these people were against — the people that lived in the two hundred foot area, they were against it. Then I thought it was the wrong location, also. And the traffic problem. And the yard, it was too small, and close to the school.

Q. All right. What about the location made it inappropriate?

A. Well, because of the elderly people that lived in that area.

* * *

A. They were — they expressed theirself they were against it, and they were concerned about these people might walk around, and scare the people. The older people. Now, this is what has been expressed to me.

* * *

[42] A. Oh, the yard was too small. I didn't think they had enough area for these people to relax in the evenings.

* * *

[43] Q. You said that the traffic was a problem. What about the traffic made it a problem?

A. Well, when school turns out it's — you have, what, three or four hundred students, and their mothers and fathers the majority of the time are picking them up, and you have an awful traffic problem there. And they're bringing them to school, and then they pick them up.

* * *

A. Well, I just didn't want them to accidently get run over or hit by the traffic. The problem of cars, so many of them.

Q. And why did it make a difference to you that the school was nearby?

[44] A. Same reason the other gentlemen said awhile ago, is I was concerned about young people. Like I said in our deposition, that we were all young people one time, and young people say things and do things that they don't really mean to hurt people, but they'll do it sometimes.

* * *

[47] Q. Can you tell the Court what mental retardation is? In your mind what it is?

A. I guess it would be unstable.

* * *

[50] Q. In regard to your own family, tell His Honor whether or not you have any experience with having among your loved ones mentally retarded persons?

A. My daughter, she had a little girl that was — was this way. She died.

Q. And having had that personal experience, Mr. Martin, I would like you to tell His Honor whether you would ever vote against somebody simply because they were mentally retarded?

A. No, sir. I would not.

* * *

[51] Q. Is that right?

A. Yes, sir.

MR. LUNA: Pass the witness.

THE COURT: All right. You may —

MR. HICKS: Excuse me. I just have a couple of questions, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. HICKS:

Q. Mr. Martin, your grandchild that died, that was mentally retarded, how old was the grandchild at the time it died?

A. It was two days old.

Q. So during the time of the child's life you didn't have a chance to learn much about mental retardation, or what the potential for that child —

A. No, sir

Q. —was, did ou?

A. No, sir.

Q. Given what you know about mental retardation, and what you learned from that brief experience, do you see any reason why mentally retarded people shouldn't be able to live in the city together the same way old folks can?

A. I don't see anything wrong with it, but I just [52] don't think that was the location.

* * *

(Excerpts from testimony of David Southern, an officer of respondent Cleburne Living Center)

[59] Q. Did Cleburne Living Center ever choose a specific site for this proposed group home?

A. Yes. The 201 Featherston address.

Q. There in Cleburne?

A. Yes.

Q. When was that site chosen?

A. Approximately July of 1980.

Q. What was the reason for choosing that particular site?

A. Well, it was very accessible to the downtown area, which we felt would be good for the clients who would be living there, since they probably would not be driving vehicles. It also was close to recreational opportunity in the community. The park was not too far, and other things were available within the central business district that we thought would aid the clients in having those things available to them. Also, the size of the home was we felt more than adequate to house the number of residents that we planned to put there.

Q. All along had you planned to put in room for thirteen residents?

[60] A. Well, originally — to break even on a facility of this type, you have to have at least ten or eleven residents. So we planned to open a facility for somewhere between ten and fifteen residents. When we found this particular location, it was, we felt, adequate for thirteen residents, clients.

* * *

[66] Q. How many clients would be residing there?

A. Thirteen.

Q. Okay. What ages would they be?

A. Eighteen and above.

Q. All right. What sex would they be?

A. They would be both male and female.

* * *

[68] Q. Will these people be free to come and go as they wish, or do they have any restrictions on them?

A. Well, of course, that's determined by their intellectual capacity and what the interdisciplinary team, which is the professional and nonprofessionals of the facility, decide that person is capable of. We can't [69] restrict them from activities that they are capable of, but yet if they are uncapable of certain activities, we do have the authority through the interdisciplinary team to restrict them from those activities.

* * *

[71] A. I mean placement in an institution with the State of Texas, and particularly such as a state school. Many clients that come into these facilities have been institutionalized in a state school or have been in a state school for up to ten or twenty years.

Q. Well, where would the people that are the potential residents of this group home be drawn from? Where do they live now?

A. Both from the community and from state schools that are in close proximity. Many of the people who came from the Johnson County area, and the area immediately surrounding it, and who were institutionalized many years ago when these kind of programs were not available, we try to bring back to the community from which — the community area from which they were put in the institution.

Also, there are many parents who because of advancing age feel that they're no longer in the position to care for their mentally retarded children, and they place them in this kind of program also.

* * *

[72] Q. Is there — You were mentioning earlier the institutionalization of some of the people that would be living there. Are there any state institutions nearby? Near Cleburne?

A. Yes. I think the two closest are Fort Worth State School and Mexia State School. I think Mexia is about sixty miles or so from Cleburne, and Fort Worth is probably forty-five miles or forty miles.

Q. So there's a possibility that several of the residents at the proposed facility would come from those two institutions?

A. Yes. Uh-huh.

* * *

[86] Q. Okay. In your presentation to the city council, what did you tell them?

A. Well, basically, I explained — there were several issues at the planning and zoning commission meeting that had been brought up that were really not relevant to the situation. Such as the possible flooding, the traffic problems, and the size and use of the house. And I first, you know, told them that those things were not relevant, and had documentation to the effect of why they were not relevant.

* * *

[108] A. You could admit anyone with between a thirty-five and sixty-nine IQ, that's correct. Well, thirty-six. Over thirty-five, which would be thirty-six IQ.

* * *

[109] Q. Well, as you planned it, people that would be there, would there be included in the group people who would both be able to distinguish right from wrong as to their conduct on the street, as well as people who would not be able to distinguish right from wrong?

A. Well, we — it would depend on your admission criteria. Of course, each facility is required to have an admission

criteria before, you know, you take clients into [110] your particular facility. Generally speaking, people with that IQ are able to distinguish the difference between right and wrong per se. That's not to say that they don't have some social behaviors that wouldn't be looked upon as a little peculiar. They might have. But —

Q. Such as aggressiveness?

A. No, no.

Q. You have never seen —

A. There are some people with thirty-six IQ, as there are some people with a hundred and thirty-six IQ, who are aggressive, that's true. But we would not take those clients. Because in a community type placement you don't take that — that kind of behavior. That's really what the state schools are for.

Q. Well, do you have a list of criteria of what you would and would not take?

A. Well, the admission criteria that we have for our facility in Keene will be the same admission criteria that we would use in the facility in Cleburne.

* * *

[111] Q. Does it have any provision in it that you will not accept people who's — who do not know right from wrong?

A. I don't think it states that specifically, no.

* * *

Q. Well, are any of your — have you ever had a situation where any of your people at Keene, for example, would destroy property of others?

A. No.

* * *

A. We did have one client at Keene for a brief period of time who took some mail out of a mailbox, and — but he later returned it.

* * *

[112] Q. Now, how do you restrict them? Did you plan to keep the doors locked?

A. No. From the — Well, they're locked to the outside, not to the inside.

Q. So, then, people from the inside have no barrier to keep them from leaving at any time during the night, if they choose to do so?

* * *

[128] Q. (MR. LUNA) Oh, by the way, these few regulations that you have told us that were adopted, I believe you said last November?

A. I believe that's correct.

Q. One of the things that those regulations specifically require, is it not, sir, that the proposed facility must be located in an incorporated city, which is subject to special use permit requirements, local zoning and/or occupancy code requirements, and must be noncontiguous to an already existing facility?

* * *

[129] Q. And the — those requirements also required that requests for certification will be limited to a maximum of six beds per facility, whether the facility is currently certified or whether the request is for certification for a new facility, did it not?

A. It did.

Q. So the facility that you have, that you're requesting at Cleburne, instead of putting six beds, you wanted to put thirteen?

A. That's correct.

* * *

Q. Mr. Southern, do you know whether you, Cleburne Living Center, will be subject to the requirements that Mr. Luna was just discussing with you?

[130] A. Yes. We —

Q. If and when Cleburne Living Center gets to open the 201 Featherston Street property?

A. Yes. We will not be subject to the requirement for six beds.

Q. How do you know that?

A. We have a letter from Marlin Johnston, who's the Commissioner of the Texas Department of Human Resources, indicating that — that we will be exempt from that, because of the fact that we have done all that was necessary prior to that, and that we don't have to do that at this time.

* * *

[131] Q. (MR. HICKS) If, in fact, Cleburne Living Center is ultimately permitted to operate at 201 Featherston as a Level I Intermediate Care Facility for Mentally Retarded persons, do you have any intention of so operating?

A. Yes, we do.

* * *

(Excerpts from testimony of Dr. Philip Roos)

[137] Q. (MR. HICKS) Dr. Roos, what is mental retardation?

A. Essentially, mental retardation is a problem of learning. It is manifested particularly in difficulty with abstract

thinking, judgment and problem solving and retention, [138] but also includes social adjustment and economic productivity.

Q. How do you decide if a person is mentally retarded?

A. We use basically three criteria: Measured intelligence, adaptive behavior and medical classification.

Q. How are these determined? Are they measurable?

A. Measured intelligence is measured by using a standard test of intelligence, traditionally yields an IQ or intelligence quotient. Adaptive behavior can be measured using such an instrument as the violent social maturity scale, and it can leave a measure of social adaptability, the so-called social quotient. The medical classification is determined on the basis of medical and biomedical evaluations. In assessing an individual as mentally retarded, the typical approach is to use a number of disciplines working together.

• • •

Q. Is mental retardation a type of a mental illness?

A. No, sir. It's an entirely different condition, requiring entirely different approaches.

Q. Well, how do they differ?

A. Mental retardation is a problem of a deficit in [139] intellectual development and social adaptation. Its onset is sometimes from birth or during childhood. It is primarily an educational type of problem. And, traditionally, it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition.

Mental illness, on the other hand, is a disorder of thinking, of emotions and of behavior. It can occur any time in life, often after a period of normal development. It is primarily a psychiatric, rather than an educational problem, and often it is reversible. That is, it is potentially curable in many cases.

• • •

[140] Q. Are there different degrees or levels of mental retardation?

A. Very definitely. There is a wide variability among retarded individuals. The mildest level of mental retardation, referred to as mild mental retardation, these are individuals who's intelligence is roughly between an IQ of 50 and an IQ of 70. This includes approximately eighty-nine percent of all mentally retarded people. Roughly nine out of ten mentally retarded people are mildly retarded.

Moderate mental retardation, IQ's of roughly 35 to 50, include six percent of the population. Severe mental retardation, IQ's 20 to 35, profound retardation, IQ below 20, these two categories combined include only about five percent of the population.

Q. What might be expected from persons falling in the mild to moderate categories of mental retardation?

A. It depends a great deal on the educational opportunities and the opportunities for prevocational and vocational training. Given such opportunities, the vast majority of these individuals can become self-sufficient, economically productive members of society. Most of these people live in communities with the rest of us, and, in point of fact, most become invisible after they leave school.

Q. How might one identify a mildly retarded person on casual contact, such as a street encounter or in the checkout [141] line at a supermarket?

A. In the vast majority of cases it would be impossible to do so on an informal contact.

Q. How common is mental retardation?

A. Mental retardation, unfortunately, is one of the most common conditions handicapping human beings in our society today. The incidence of mental retardation is

approximately three percent. That means that roughly a hundred and twenty-five thousand babies are born each year who will be mentally retarded. That's about one every five minutes. We estimate that there are some six and-a-half million citizens in the United States who will be mentally retarded at some time in their life.

• • •

Q. Has mental retardation always been such a major problem?

A. It was less of a handicap in less complex societies. Mildly retarded people were generally not identified. The severely retarded individual, however, has always been recognized, and in the past has often been ridiculed, punished, segregated and so forth.

• • •

[142] Q. What happened in 1950?

A. A number of things. A presidential panel on mental retardation was established, which later became the President's Committee on Retardation, which became a strong and viable advocate for retarded persons at the national level. Our own association, the Association for Retarded Citizens, was founded in 1950, and became a very strong consumer advocate voice in the nation. A new philosophy began to permeate the field of mental retardation and other disabilities; consumerism became an important force.

• • •

[144] Q. (MR. HICKS) Well, has the public a good understanding of mental retardation today?

A. It has improved in the last few years. This has been due in part to media coverage, and to the picturing of mentally retarded people through the media as real, genuine human beings.

Q. What would be a more accurate picture of mentally retarded?

A. In point of fact, they are genuine human beings. [145] And it's unfortunate that this is a relatively recent image which has emerged. They're unique people. They have the same needs and the same rights as the rest of humanity. Perhaps there's more obstacles to overcome than some of us.

• • •

[152] Q. You have just used the word "normal". Are you suggesting that treating retarded people normally will make [153] them normal?

A. No, sir, I'm not. I am saying that by treating them as normally as possible, this will enhance their capacities to learn, grow and develop, and to approximate to the greatest extent possible the normative behavior that we find in society today.

• • •

[154] Q. Have you ever heard of the principle of individualization?

A. Yes.

Q. Briefly, what is that principle?

A. That is the concept that we approach each retarded person as a unique individual, and that we design programs and services which will best meet his individual needs.

• • •

[156] Q. What is the relationship, if any, between the appropriateness and viability of a group home for mentally retarded adults and the presence nearby of a public junior high school?

[157] A. I see no relationship.

• • •

Q. Dr. Roos, for purposes of this question, will you assume that the following list of uses are permitted uses in a particular district in a city zoning?

A. Okay.

Q. Apartment houses, boarding houses, fraternity houses, dormitories, apartment hotels, eleemosynary [158] institutions, other than penal institutions, and hospitals, sanatariums, nursing homes or homes for convalescent or aged people, except hospitals or group homes for mentally retarded people. Okay?

And assume that a hospital for mentally retarded people, or a group home for mentally retarded people, cannot operate without a special permit.

Do you see any basis for that different treatment?

A. I do not.

* * *

[159] Q. Yes, sir. But you would agree that — with the requirements that the State of Texas published on or about December 22, 1981, wherein they said that all future applications should be for homes in this class of not more than six people, wouldn't you?

A. Would I agree with that?

Q. Yes, sir.

[160] Is that your question?

Q. Yes, sir.

A. As an expert in mental retardation, I would not agree with that.

* * *

[162] Q. Now, in view of the finding that — by the State of Texas and the publishing of the regulations which say that no more than six will be included in new applications [163] beginning May 1, 1982; in view of that, you would

assume that if there is reasonable data to back that up, it therefore would not be unreasonable for a city council to decline to approve a special use permit that would have as many as thirteen?

A. If there are validating data to substantiate the basis of that, I would say there is a reasonable basis for it.

* * *

[165] Q. Have you known mentally retarded people with an IQ of between thirty-five and forty who would not know that it was wrong to go take somebody else's mail out of the mailbox?

A. Yeah.

Q. Have you known mentally retarded persons with an IQ of between thirty-five and forty who would not know that it would be wrong to destroy other property of elderly people who live in the immediate neighborhood?

A. Yeah. Uh-huh.

* * *

[168] Q. Dr. Roos, the defendant's attorney was questioning [169] you earlier about some state regulations talking about beds with six — ICF-MR's with beds for six or less. You don't know, do you, whether the basis for that regulation was any study of the needs of mentally retarded people, or fiscal considerations of the state or something else?

A. I do not know, sir.

* * *

(Excerpts from testimony of Jerry Walker)

[303] Q. And after May 1, 1982, if a Level I, V or VI facility has — is designed and intends to keep more than six people, will it be able to be certified?

A. No, sir.

Q. And those rules are provided to present criteria for greater assurance that facilities will be a normal residence, with access to programmatic resources, and that the facilities will be well integrated into the local community, and that the facilties will meet a service need in coordination with other mental retardation development disability services providers, are they not, sir?

A. Yes, sir.

Q. And these outcomes are of benefit to both the developmentally disabled client, client consumers, and the communities in which the facilities are to be located, are they not?

A. I believe that says that, yes.

Q. Now I would like for you to look over in the right-hand column, under 2(a), and tell the Court whether or not after May 1 a facility may be located in a city which does not have the facilities of a special use permit requirement, local zoning and/or code requirements?

[304] A. No, sir, they have to meet that requirement.

Q. All right, sir.

MR. LUNA: If it please the Court, we offer Defendant's Exhibit 10 in evidence.

THE COURT: Is there objection?

MR. HICKS: I haven't seen it, Your Honor. I have no objection, Your Honor.

THE COURT: Defendant's 10 is admitted.

* * *

[306] Q. Mr. Walker, the rules that were just referred to in Defendant's Exhibit Number 10, you participated in the drafting of those rules, didn't you?

A. Yes.

Q. Were they promulgated for fiscal reasons?

A. Yes, they were.

* * *

(Excerpts from testimony of Robert Miller, former employee of City of Cleburne)

[344] Q. (MR. LUNA) Would you tell the Court whether there are — whether or not there are other areas that in your opinion would be appropriate in the City of Cleburne?

A. Yes, I — I think that there are other areas which would be more appropriate within the City of Cleburne. What would be required first, should the proper location be found, that the property be rezoned or should be found to be R-3 zoning, which is what these types of facilities are required to be operated under.

I know specifically of a location within the City of Cleburne, which I believe was looked at, which would have been perhaps a more proper facility for this.

Q. Where is that location?

A. It is — and I don't recall the exact name of the street, but it's a block or two from the hospital.

Q. Near doctor's offices?

A. Johnson County Memorial Hospital, as well as doctor's offices.

[345] Q. Tell us whether or not it's on a main street, such as Featherston, or an off street with less traffic.

A. It is on an off street with less traffic.

Q. And does that — that's one facility that these very — these very operators looked at?

A. It's my understanding, yes.

* * *

[346] A. This is a tax roll card for the City of Cleburne.

* * *

[347] Q. And is it a true and correct photocopy of the original instrument which is on file in — as one of the records in the Tax Office, City of Cleburne?

A. Yes, it is.

Q. Does it show the size of the house involved here?

A. I believe it does. On page 2 it indicates that the structure type, which is a residence, consists of two thousand five hundred ten square feet.

* * *

Q. (MR. LUNA) Directing your attention to the zoning ordinance, I would like for you to tell the Court whether or not there's anything in that ordinance, or any other ordinance that you know of in the City of Cleburne, that prohibits mentally retarded people from living in that city?

A. There is nothing, no.

* * *

[349] Q. Well, what else about the house makes it more appropriate for a person that's mentally retarded to live there?

A. Well, for the number of people that were going to be housed, it was a much larger facility?

* * *

[351] Q. Are you aware that that particular property that you referred to would not meet state standards for intermediate care facilities for the mentally retarded for Level I?

A. No, I'm not.

Q. Did you bother to check?

A. No.

• • •

(Excerpts from testimony of Jan Hannah, respondent and an officer of Cleburne Living Center, Inc.)

[367] Q. Mrs. Hannah, are you familiar with the property on Nelson Street that Mr. Miller was referring to earlier in his testimony?

A. You're speaking of what is commonly referred to as the old Nelson Nursing Home in Cleburne?

Q. I do not know what it's called.

A. I believe that's the property he was referring to. Yes, I'm very familiar with it.

Q. Did you ever engage in negotiations about the purchase of the house?

A. Yes, we did.

Q. And what was the result of those negotiations?

A. We could not come to terms with the owner.

• • •

[368] Q. So you figured that the overall cost, by the time you got the repairs made to get it to comply, would cut down the profit that you would have after leasing the other house?

A. It would not have cut down on the profit, it would have been — we would have been unable to have carried the burden of the cost.

• • •

(Excerpts of testimony of David Southern)

[369] Q. Mr. Southern, are you familiar with the property in Cleburne on Nelson Street, to which Jan Hannah and Robert Miller have been referring in testimony?

A. Yes.

* * *

Q. Would it meet state intermediate care facility for [370] mentally retarded Level I standards?

A. No.

* * *

Q. And the state people didn't tell you that the other piece of property could not be made to comply by proper repairs, did they?

A. They indicated to me that it would never be appropriate for a group home for mentally retarded.

* * *

Excerpts from Plaintiffs' Exhibit No. 1.

APPENDIX A

ZONING ORDINANCE*

AN ORDINANCE TO REGULATE AND RESTRICT THE HEIGHT, NUMBER OF STORIES, AND SIZE OF BUILDINGS, AND OTHER STRUCTURES, THE PERCENTAGE OF LOT THAT MAY BE OCCUPIED, THE SIZE OF THE YARDS, COURTS AND OTHER OPEN SPACES, THE DENSITY OF POPULATION, AND THE LOCATION AND USE OF BUILDINGS, STRUCTURES, AND LAND FOR TRADE, INDUSTRY, RESIDENCE, OR OTHER PURPOSES; AND IN THE CASE OF DESIGNATED PLACES AND AREAS OF HISTORIC AND CULTURAL IMPORTANCE, TO REGULATE AND RESTRICT THE CONSTRUCTION, ALTERATION, RECONSTRUCTION, OR RAZING OF BUILDINGS AND OTHER STRUCTURES; TO DIVIDE THE MUNICIPALITY INTO DISTRICTS AND ESTABLISH, BY REFERENCE TO A MAP, THE BOUNDARIES OF SAID DISTRICTS FOR SAID PURPOSES; TO PROVIDE FOR OFF-STREET PARKING

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*Editor's note — The zoning ordinance is printed herein as adopted June 8, 1965. The original arrangement, section numbers, catchlines and headings have been retained. Zoning map amendments and ordinances zoning or rezoning specific property are not included herein, but are on file in the city clerk's office.

Charter reference — Authority of council relative to zoning, § 5.

Cross references — Planning and zoning commission, § 2-63 et seq.; city-county joint airport zoning board, §§ 3-1, 3-2; keeping of bees prohibited in certain residential areas, § 5-1; buildings and general building regulations, ch. 6; streets and sidewalks, ch. 25; building lines for business structures on certain streets, § 6-2; subdivision regulations, App. B.

State law reference — Zoning regulations, Vernon's Ann. Civ. St. art. 1011a et seq., 1175(26).

AND LOADING; TO PROVIDE FOR DEFINITIONS; TO PROVIDE FOR ITS INTERPRETATION AND AMENDMENTS HERETO; TO PROVIDE FOR ITS ENFORCEMENT AND PROVIDING PENALTIES FOR VIOLATION OF ITS PROVISION; TO PROVIDE FOR A BOARD OF ADJUSTMENT AND DEFINING ITS POWERS AND DUTIES; TO PROVIDE FOR PERMITS; TO PROVIDE FOR INVALIDITY OF A PART; AND FOR REPEAL OF ALL ORDINANCES OR PARTS THEREOF IN CONFLICT WITH THIS ORDINANCE.

1153

FOR THE PURPOSE OF PROMOTING HEALTH, SAFETY, MORALS, AND THE GENERAL WELFARE OF THE COMMUNITY, THE GOVERNING BODY OF CLEBURNE DEEMS IT NECESSARY TO ADOPT THE REGULATIONS MADE IN ACCORDANCE WITH A COMPREHENSIVE PLAN AND DESIGNED TO LESSEN CONGESTION IN THE STREETS; TO SECURE SAFETY FROM FIRE, PANIC AND OTHER DANGERS; TO PROMOTE HEALTH AND THE GENERAL WELFARE; TO PROVIDE ADEQUATE LIGHT AND AIR; TO PREVENT THE OVERCROWDING OF LAND; TO AVOID UNDUE CONCENTRATION OF POPULATION; TO FACILITATE THE ADEQUATE PROVISION OF TRANSPORTATION, WATER, SEWERAGE, SCHOOLS, PARKS, AND OTHER PUBLIC REQUIREMENTS. NOW THEREFORE BE IT ORDAINED BY THE GOVERNING BODY OF CLEBURNE, TEXAS.

1154

* * *

Section 2. Short title.

These regulations shall be known and may be cited as the Zoning Ordinance of Cleburne, Texas.

1161

Section 3. Districts.

For the purpose of regulating and restricting the use of land and the erection, construction, reconstruction, alteration, moving or use of buildings, structures or land, all lands within the corporate limits of Cleburne are hereby divided into fourteen (14) districts with their respective rank from more to less restrictive classification as follows:

District R-1.	Single-Family Dwelling District.
District R-2.	Two-Family Dwelling District
District R-T.	Townhouse District.
District R-3.	Apartment House District.
District C-MW.	Miniwarehouse District.
District C-O.	Nonretail District.
District C-1.	Local Business District.
District C-2.	General Business District.
District C-3.	Commercial District.
District C-4.	Private Clubs, etc.
District C-P.	Planned Business District.
District M-1.	Light Industrial District.
District M-2.	Heavy Industrial District.
District MH.	Mobile Home District.

Any use not listed herein may be placed in a suitable district classification by the Governing Body, after recommendation of the Planning and Zoning Commission. (Ord. of 11-9-71; Ord. No. 7-1976-32, § 1, 7-26-76; Ord. No. 4-1977-11, § 1, 4-12-77; Ord. No. 6-1978-23, § 1, 6-13-78)

Section 4. District map adopted

Boundaries of the districts, as enumerated in Section 3 of this Ordinance, are hereby established as shown on a map

prepared for that purpose, which map is hereby designated as the Zoning District Map; and said map and all the notations, references and information shown thereon is hereby made as much a part of this Ordinance as if the same were set forth in full herein. The City Planning Commission shall keep on file in its office an authentic copy of said map, and all changes, amendments or additions thereto.

1162

When definite distances in feet are not shown on the Zoning District Map, the district boundaries are intended to be along existing street, alley or platted lot lines, or extensions of the same, and if the exact location of such lines is not clear, it shall be determined by the Building Inspector, due consideration being given to location as indicated by the scale of the Zoning District Map.

When streets or alleys on the ground differ from the streets or alleys as shown on the Zoning District Map, the Building Inspector may apply the district designations on the map to the streets or alleys on the ground in such a manner as to conform to the intent and purpose of this Ordinance.

Whenever any street or alley is vacated, the particular district in which the adjacent property lies shall be automatically extended to the center line of any such street or alley. Whenever a street or alley is dedicated, the zoning district within the area dedicated shall be void.

1162.1

Section 5. Requirements must be observed.

Except as hereinafter specifically provided:

1. No building or structure shall be erected, constructed, reconstructed, moved or altered, nor shall any building, structure or land be used for any purpose other than is permitted in the district in which such building, structure, or land is situated.
2. No building or structure shall be erected, constructed, reconstructed, moved or altered, to exceed the height

or area limit or the yard or parking requirement herein established for the district in which such building or structure is located.

3. No lot area shall be reduced or diminished so that the yards or other open spaces shall be smaller than prescribed by these requirements, nor shall the density of population be increased in any manner, except in conformity with the area regulations established herein.
4. Every building hereafter erected or altered shall be located on a lot as herein defined and in no case shall there be more than one main building on one lot except as provided herein.

Section 6. District R-1. Single-family dwelling district.

USE REGULATIONS

In District R-1 no building, structure, land or premises shall be used and no building or structure shall be hereafter erected, constructed, reconstructed, moved, or altered, except for one or more of the following uses: (For exceptions see Section 16, Special Use Permits; and Section 17, Nonconforming Uses.)

1. Dwellings, one family.
2. Churches, and publicly owned and operated community buildings, public museums, public libraries.
3. Public parks and playgrounds, including public recreation or service buildings and swimming pools within such parks, public administrative buildings, police and fire stations.

4. Public schools, elementary and high, and private schools with curriculum equivalent to that of a public elementary or high school, and institutions of higher learning, including stadium and dormitories in conjunction, if located on the campus.
5. Golf courses and clubhouses appurtenant thereto, (except miniature golf courses, driving ranges and other

similar activities operated as a business), provided no clubhouse, swimming pool, or parking area shall be closer than one hundred (100) feet to a property line.

6. Railroad right-of-ways, not including railroad yards.
7. Agriculture.
8. Nurseries, and truck gardens limited to the propagation, cultivation and sale of plants; provided that no obnoxious fertilizer is stored upon the premises, and no obnoxious soil or fertilizer renovation is conducted thereon. Greenhouses may be constructed by Special Use Permit.
9. Accessory uses, customarily incident to the above uses and located on the same lot therewith, not involving the conduct of a business or industry. No equipment, material or vehicle other than motor passenger cars shall be stored in any residential district.

a. Automobile parking areas which are necessary to the uses permitted in this district.

b. The term "accesory use" shall include customary home occupations, such as the office of physician, dentist, surgeon, dressmaker, musician, or artist under the following restrictions:

(1) That such uses are located in the dwelling used by a person as his or her private residence.

(2) That no assistant or other than a member of the family household is employed, and no window display or sign, either illuminated or more than one (1) square foot in area is used to advertise the same.

(3) That no power other than electric and of not more than one-half horse power is used in any one machine, and not more than one horse power total is used in such home occupation.

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c. For any dwelling house there shall be permitted one private garage or covered carport, with space for not more

than one vehicle for each two thousand (2,000) square feet of lot area, or servant's quarters, provided that such garage or servant's quarters shall be located not less than sixty (60) feet from the front lot line, nor less than three (3) feet from any side lot line, nor less than one (1) foot from any alley line, except that when the rear lot line is common to a side or rear lot line of another lot, such outbuilding must be located at a minimum of three (3) feet from said rear lot line, and in the case of corner lots not less than the distance required for residences from side streets, and further provided that such servant's quarters shall be occupied only by servants employed on the premises. If both garage and servant's quarters are detached, they shall be combined in one building. A garage may be constructed across a common lot line by mutual agreement between property owners. A garage or servant's quarters constructed as an integral part of the main building shall be subject to the regulations affecting the main building, except that on a corner lot, a private garage, when attached to the main building and not exceeding the height of the main building, may extend into the required rear yard to a point not less than eighteen (18) feet from the rear lot line, and shall not occupy more than thirty (30) per cent of the required rear yard. No part of a detached accessory building shall be closer than ten (10) feet to the main building.

d. A private stable will be permitted on a lot having an area of more than twenty thousand (20,000) square feet, provided that it is located not less than fifty (50) feet from any property line. On such lots there shall not be kept more than one horse or pony for each ten thousand (10,000) square feet of lot area, or one cow for each twenty thousand (20,000) square feet of lot area. Twenty-five (25) fowl or rabbits shall be permitted for each twenty thousand (20,000) square feet of lot area. No such fowl or rabbits shall be housed nearer than fifty (50) feet to a property line.

e. Temporary real estate sales office, located on property being sold, and limited to period of sale, but not exceeding two years without Special Use Permit.

f. A hobby shop may be operated as an accessory use by the occupant of the premises purely for personal enjoyment, amusement or recreation; provided such use shall not be obnoxious or offensive by reason of vibration, noise, odor, dust, smoke or fumes or electrical interferences.

g. Signs as provided in Section 21.

h. A driveway or walk, as distinct from a dedicated street, to provide access to premises in a District C-1 to M-2 inclusive shall not be permitted in a District R-1 to R-3 inclusive.

HEIGHT AND AREA REGULATIONS

In District R-1, the height of buildings, the minimum dimensions of lots and yards, and the minimum lot area per family permitted on any lot, shall as follows: (For exceptions see Section 18, Height and Area Exceptions).

Height: Buildings or structures shall not exceed thirty-five (35) feet, and shall not exceed two and one-half (2½) stories in height.

Front yards: Any building hereafter constructed shall provide for a front yard, the minimum depth of which shall be at least thirty (30) feet.

Side yards: There shall be a side yard on each side of a building not less than ten (10) per cent of the width of the lot; except that such side yard shall not be less than seven (7) feet, and need not be more than fifteen (15) feet.

Buildings on corner lots shall provide a side yard on the street side of not less than fifteen (15) feet, provided this regulation shall not be so interpreted as to reduce the buildable width of a corner lot in separate ownership at the time of the passage of this Ordinance to less than thirty-five (35) feet.

Rear yards: The depth of the rear yard shall be at least twenty (20) feet.

Lot area per family: Every dwelling hereafter erected, moved, or altered shall provide a lot area of not less than seven thousand (7,000) square feet per family, provided that [1166] where a lot has less area than herein required in separate ownership at the time of the passage of this Ordinance, this regulation shall not prohibit the erection of a one-family dwelling. Where a public or community sewer is not available and in use for the disposal of all sanitary sewage, each lot shall provide not less than fifteen thousand (15,000) square feet per family.

Lot width: The minimum width of a lot shall be sixty (60) feet, provided that where a lot has less width than herein required in separate ownership at the time of the passage of this Ordinance, this regulation shall not prohibit the erection of a one-family dwelling.

Minimum dwelling size: Six hundred fifty (650) square feet of living floor area per family.

Parking regulations: (See Section 20, Off-Street Parking and Loading). (Ord. No. 12-1976-60, § 1, 12-14-76)

Section 7. District R-2. Two-family dwelling district.

USE REGULATIONS

In District R-2 no building, structure, land or premises shall be used, and no building or structure shall be hereafter erected, constructed, reconstructed, moved, or altered, except for one or more of the following uses: (For exceptions see Section 16, Special Use Permits; and Section 17, Nonconforming Uses).

1. Any use permitted in District R-1.
2. Dwellings, two-family.
3. Accessory uses as provided in District R-1, except that in District R-2 a private garage or carport may provide space for not more than one motor vehicle for each fifteen hundred (1500) square feet of lot area.
4. Signs as provided in Section 21.

HEIGHT AND AREA REGULATIONS

In District R-2 the height of buildings, the minimum dimensions of lots and yards and the minimum lot area per

1167

family permitted on any lot shall be as follows: (For exceptions see Section 18, Height and Area Exceptions).

Height: Same as District R-1.

Front yards: Same as District R-1.

Side yards: Same as District R-1, including regulations for corner lots.

Rear yards: Same as District R-1.

Lot area per family: Every dwelling hereafter erected, moved, or altered shall provide a lot area of not less than seven thousand (7,000) square feet per family for one-family dwellings, or thirty-five hundred (3,500) square feet per family for two-family dwellings, provided that where a lot has less area than herein required, in separate ownership, at the time of the passage of this Ordinance, this regulation shall not prohibit the erection of a one-family dwelling. Where a public or community sewer is not available and in use for the disposal of all sanitary sewage, each lot shall provide not less than fifteen thousand (15,000) square feet per family.

Lot width: Same as District R-1.

Minimum dwelling size: Same as District R-1 for one-family dwellings. No minimum for other dwellings.

Parking regulations: (See Section 20, Off-Street Parking and Loading).

Section 7.1. District R-T. Townhouses.

USE REGULATIONS

In District R-T, no buildings, structures, land or premises shall be used, and no building or structure shall be hereafter

erected, constructed, reconstructed, moved or altered, except for one or more of the following uses:

1. Any use permitted in District R-2.
2. Townhouses, rowhouses or other dwellings with common walls.

1168

3. Accessory buildings and uses.

HEIGHT AND AREA REGULATIONS

In District R-T the height of buildings, the minimum dimensions of lots and yards and the minimum lot size per townhouse shall be as follows:

Height: There shall be no height limitation on buildings or structures in this district, except when the same are within two hundred (200) feet of an R-1 or R-2 District, in which case the maximum height thereof shall be thirty-five (35) feet.

Setback: Yard setbacks and building lines shall be not less than the following:

(1) Buildings adjacent to public streets which are internal to the townhouse development shall [be] set back not less than thirty (30) feet from the right-of-way lines of said streets.

(2) Buildings containing dwelling units fronting on a place or court and facing other such buildings shall be separated from said buildings by not less than sixty (60) feet of open space.

(3) Buildings adjacent to major thoroughfares, collector streets, or other public streets which are not internal to the townhouse development shall be set back not less than thirty (30) feet from the right-of-way of such streets.

(4) Buildings adjacent to property which is not a part of the townhouse development shall be set back as follows:

(a) If the front or rear (i.e. that side of the building which contains primary exits or entrances) of the building faces such property, the building shall be set back not less than twenty (20) feet from the property line.

(b) If the side of the building faces such property, the building shall be set back not less than ten (10) feet from the property line.

1168.1

(5) When a building lot in this district abuts any residential lot in a more restrictive district, the minimum setback requirements of the building adjacent to such residential lot shall be increased an additional five (5) feet.

LOT SIZES

The minimum width for platted townhouses shall be:

(1) Interior lots: Twenty (20) feet

(2) End lots not on a corner: Twenty-five (25) feet

(3) Corner lots: Thirty-five (35) feet.

PARKING REGULATIONS

See Section 20, Off-Street Parking and Loading. (Ord. No. 6-1978-23, § 2, 6-13-78)

Section 8. District R-3. Apartment house district.

USE REGULATIONS

In District R-3, no building, structure, land or premises shall be used, and no building or structure shall be hereafter erected, constructed, reconstructed, moved or altered, except for one or more of the following uses (For exceptions see Section 16, Special Use Permits; and Section 17, Nonconforming Uses.):

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.

3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels

1168.2

6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.
7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
8. Philanthropic or eleemosynary institutions, other than penal institutions.
9. Accessory uses customarily incident to any of the above uses, and located on the same lot, not involving the conduct of a business or industry.
   a. There shall be permitted such facilities as are customarily accessory to the operation of an apartment hotel when conducted and entered from within the building.
   b. Private or storage garages, located as provided in District R-1 for private garages, may provide space for not more than one motor vehicle for each seven hundred and fifty (750) square feet of lot area. No business occupation or service connected with motor vehicles, except washing occupant autos shall be permitted.
10. Signs as provided in Section 21.

HEIGHT AND AREA REGULATIONS

In District R-3 the height of buildings, the minimum dimensions of lots and yards and the minimum lot area per family permitted on any lot shall be as follows: (For exceptions see Section 18, Height and Area Exceptions.)

Height: Buildings or structures shall not exceed forty-five (45) feet or three (3) stories in height. Except that a building may be erected to a greater height if setbacks from all

required yard lines are increased one foot for each two (2) feet of additional height above forty-five (45) feet.

Front yards: Same as District R-1, including regulations for corner lots.

Rear yards: Same as District R-1.

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Lot area per family: Every building or portion of a building hereafter erected, moved or altered shall provide a lot area for one- and two-family dwellings, the same as in District R-2. The minimum lot area for multiple family dwellings shall be fifteen hundred (1500) square feet per family; provided that where a lot has less area than herein required in single ownership, at the time of the passage of this Ordinance, this regulation shall not prohibit the erection of a one-family dwelling. Where a public or community sewer is not available and in use for the disposal of all sanitary sewage, each lot shall provide not less than fifteen thousand (15,000) square feet per family.

Lot width: Same as District R-1.

Minimum dwelling size: Same as District R-2.

Parking regulations: (See Section 20, Off-Street Parking and Loading.)

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1170

Section 16. Special use permits.

Any of the following uses may be located in any district by Special Use Permit of the Governing Body, after public hearing, and after recommendation of the Planning Commission, under such conditions as to operation, site development, parking signs, and time limit as may be deemed necessary in order that such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purposes of this Ordinance. Such uses shall comply with the height and area regulations of the district in which they may be located, except that radio, television and microwave towers, and drive-in theater screens may exceed said height regulations.

To better facilitate supervision of the special use permits, a limitation of one year is applicable to each such permit issued.

Within thirty (30) days from the anniversary date the special use permit is granted, the property owner shall file

an affidavit with the city secretary verifying that the property is still being used for the purpose granted by the special use permit, and will be submitted by the city secretary for council approval or disapproval. Failure to file the said affidavit shall automatically cancel permit.

Each applicant shall be required to obtain the signatures of the property owners within two hundred (200) feet of the property to be used for the following purposes under the special use permit:

1. Amusement parks, commercial baseball or athletic fields, race tracks, circuses, carnivals or fairgrounds.
2. Aviation fields or airports, under such restrictions as the Governing Body, after report from the Planning Commission, may impose on land, buildings or structures within an approach or transition plane or turning zone to promote safety of navigation and prevent undue danger from confusing lights, electrical interference or other hazards.
3. Telephone exchange buildings.
4. Nursery schools.
5. Cemeteries, mausoleums, or crematories for the disposal of the human dead.
6. Drive-in theaters.
7. Golf driving ranges, commercial or illuminated.
8. Gun clubs, skeet shoots or target ranges.
9. Hospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions.

10. Picnic groves and fishing lakes, including minor and incidental concession facilities for patrons only.
11. Mines or quarries, including the removing, screening, crushing, washing or storage of ore, sand, clay, stone, gravel or similar materials; provided, however, that no Special Use Permit shall be issued until and unless

1190.2

the locations, site plan, and method of operation, including necessary structures, have been submitted to and approved in writing by the Governing Body after report from the Planning Commission, which permit shall be for a limited period of time not to exceed five (5) years.

12. Nursery sales office, building or greenhouse (wholesale or retail).
13. Radio, television and microware towers.
14. Refuse dumps.

1190.3

15. Reservoirs, wells, towers, filter beds, or water supply plants.
16. Riding stables and tracks.
17. Sewage, refuse, garbage disposal plants or sanitary fills.
18. Swimming pools, commercial.
19. Trailer courts, subject to the following regulations:
    a. Each trailer lot shall be not less than fifty (50) by seventy-five (75) feet in size and three thousand seven hundred and fifty (3,750) square feet in area.
    b. Each trailer lot shall have connections to a sanitary sewerage system or spetic tank to be approved by the City Engineer, and to a pure and safe water supply.
    c. The minimum distance between trailers shall be twenty-five (25) feet, and no trailer shall be

located closer than thirty (30) feet to a court property line.

d. At least one hundred (100) square feet of playground area shall be provided for each trailer lot, other than the area of the trailer lot itself, except that no playground shall have an area of less than twenty-five hundred (2,500) square feet.

e. All streets and drives in the trailer court shall be paved with a seal coat, asphaltic concrete or Portland cement concrete pavement.

20. Buildings, structures, and premises for public utility services, of public service corporations, which buildings or uses the Governing Body, after report of the Planning Commission, deems reasonably necessary for public convenience or welfare.

21. Any occupation or work wherein the property owner is individually employed having to do with the personal service toward his or her customer, i.e., beauty shops, and sewing. (Ord. No. 2-1974-3, 2-12-74)

* * *

1191

Plaintiffs' Exhibit No. 1-A

ORDINANCE

NO. 3-1982-11

AN ORDINANCE AMENDING APPENDIX A, ZONING ORDINANCE, OF THE CITY OF CLEBURNE CODE OF ORDINANCES

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CLEBURNE:

SECTION I. It appearing to the City Council of the City of Cleburne that Appendix A, ZONING ORDINANCE, should be amended so that recreation or amusement machines which are operated for profit and are to be located

on a floor or level of a building which is not located on the ground floor or street level be classified as a use for which a special use permit is required and so that circuses and carnivals no longer be classified as uses for which special use permits are required, the same is amended and shall read henceforth as follows:

APPENDIX A. ZONING ORDINANCE

Section 16. Special use permits.

Each applicant shall be required to obtain the signatures of the property owners within two hundred (200) feet of the property to be used for the following purposes under the special use permit:

1. Amusement parks, commercial baseball or athletic fields, race tracks, fairgrounds, or operations for profit of recreation or amusement machines, as defined in Section 23-54 (a) of the Code of Ordinances, which machines are to be located on a floor or level of a building which is not located on the ground floor or street level of a building.

All other sections of said Ordinance shall remain in force and effect and are not waived, amended or changed in any manner.

SECTION II. This Ordinance shall have effect and be in full force from and after March 22, 1982.

PASSED AND APPROVED this the 9th day of March, 1982.

(Signatures and certification omitted in printing)

Plaintiffs Exhibit No. 1-B

ORDINANCE

NO. 4-1982-12

AN ORDINANCE AMENDING APPENDIX A, ZONING ORDINANCE, OF THE CITY OF CLEBURNE CODE OF ORDINANCES.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CLEBURNE:

SECTION I. It appearing to the City Council of the City of Cleburne that Appendix A, Zoning Ordinance, should be amended so that buildings, structures, and premises for public utility services be deleted from the uses for which a special use permit is required thereby advancing for purposes of sequential enumeration to the 20th listed use for which a special use permit is required the 21st listed use which is any occupation or work wherein the property owner is individually employed having to do with the personal service toward his or her customer, i.e., beauty shops, and sewing, and so that certain buildings, structures, and premises for public utility services be located in District R-1, Single Family Dwelling District which public utility services are controlled by the City of Cleburne or one of its public utility franchises, the same is amended and shall read henceforth as follows:

APPENDIX A. ZONING ORDINANCE

Section 6. District R-1 Single Family Dwelling District.

USE REGULATIONS

9. Sanitary sewer lift stations, elevated water storage facilities, pressure reducing or boosting facilities, water ground storage facilities, water wells and associated pumping and treating facilities, telephone cable junction or splicing facilities, power boosting facilities,

substation facilities, and any other system facility necessary by design to be placed in specific locations to facilitate the delivery of public utility services. Final placement and design of any such facility or station will be subject to final approval of the City Engineer.

10. Accessary [sic] uses, customarily incident to the above uses and located on the same lot therewith, not involving the conduct of a business or industry. No equipment, material or vehicle other than motor passenger cars shall be stored in any residential district.

Section 16. Special Use Permits.

20. Any occupation or work wherein the property owner is individually employed having to do with the personal service toward his or her customer, i.e., beauty shops and sewing.

All other sections of said Ordinance shall remain in force and effect and are not waived, amended or changed in any manner.

SECTION II. This Ordinance shall be passed and it shall have effect and be in full force from and after its passage as provided by law, and it is so ordained.

PASSED AND APPROVED this the 13th day of April, 1982.

(Signatures and certification omitted in printing)

Plaintiffs' Exhibit No. 2

[LETTERHEAD OF CITY OF CLEBURNE]

September 29, 1980

Ms. Bobbie Northrop
201 Featherstone
Cleburne, Texas 76031

Dear Ms. Northrop:

Pursuant to your request of Mr. Andy Anderson, the Public Works Director, I will attempt to explain why a Special Use Permit is required for the operation of a home for mentally deficient individuals.

Your residence is located in an R-3 zoning area. The Code of Ordinances of the City of Cleburne permits "Hospitals, sanitariums, nursing homes, or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts" in an R-3 zone. Although a home for "mentally deficient" persons is not specifically excluded, *Webster's New Ideal Dictionary* defines the term "feeble-minded" as "mentally deficient".

For exceptions to R-3 zoning one is advised to look to the section in the Code of Ordinances dealing with Special Use Permits. A Special Use Permit is required under Section 16 of Appendix A for "Hospitals for the feeble-minded." Therefore, upon that basis Andy Anderson and I felt that it would be necessary for you to obtain a special use permit in order to operate your proposed facility.

Sincerely,

ROBERT MILLER
Robert T. Miller, Jr.
Assistant City Attorney

RTM:dsw

cc. Andy Anderson

Plaintiffs' Exhibit No. 5

PLAINTIFF'S EXHIBIT 5

CASH AND INVESTMENT ASSETS AT END OF FISCAL YEAR

Type of asset			
Cash and deposits		1,581,659	1,091,197
U.S. Treasury securities		353,857	
Federal agency securities (Government-owned agencies such as Export-Import Bank, FHA, GNMA, Freddie Mac, Sallie Mae, Farmers Home Administration, Federal Farm Credit Banks, Federal Home Loan Banks, Federal Land Banks, Federal Intermediate Credit Banks, Federal Home Loan Mortgage Corporation, Federal Service, and TVA)			
State and local government securities			
Other securities (Stocks, bonds, mortgages, etc., not included in the foregoing categories. Include the following securities issued by Federal agencies: Fed. Land Banks, banks for cooperatives, and Federal intermediate credit banks. Include accrued interest on all of the securities and any other investments held.)			

EXPENDITURES OF GENERAL REVENUE SHARING FUNDS

44 2 126 0037

Alabama City, Ala.

FY 81

	Column A — PROJECTED expenditures (planning expenditures)		Column B — ACTUAL expenditures (see Planning Expenditure Report)		Column C — CODES (for use by GSA)
	Current (a)	Capital (b)	Current (c)	Capital (d)	
		43,384	39,863	51,584	
		16,000		38,236	
				28,325	
Water				1,700	
Debt Service	120,000		120,000		

CERTIFICATION

	817	641-3721 321
Finance Director		December 8, 1981

Part IV — CASH AND INVESTMENT ASSETS AT END OF FISCAL YEAR

Type of asset	Amount at end of Fiscal year — Cash assets: Funds in operating funds, as defined (a)	Funds in trust funds, as defined (b)	Funds in all other funds, excluding the gen. obligation fund (c)
1. Cash and deposits – Cash on hand and deposit, and funds in savings accounts	256,913	2,784,396	622,657
2. Federal securities – Obligations of U.S. Treasury (including short-term notes) and Federal Financing Bank	237,699		
3. Federal agency securities – Obligations of government owned agencies (excluding GSE: Export-Import Bank, FHA, GNMA, Postal Service, and TVA			
4. State and local government securities			
5. Other securities – Bonds, notes, mortgages, etc., not included in the foregoing classes, include the following securities: Federal Home Finance agencies: FHLB, FLB, FHMA; Banks for cooperatives; and Federal intermediate credit banks. Exclude corporate securities, value of real property, and any other investments or assets.			

Part V — EXPENDITURES OF GENERAL REVENUE SHARING AND ANTIRECESSION FISCAL ASSISTANCE FUNDS

44 1 1260037
Clebourne Ct, FA
F.Y. 80

Purposes or purposes of expenditures	GENERAL REVENUE SHARING AND FEDERAL ANTIRECESSION EXPENDITURES: Column A — PREFERRED (Authorized Revenue Sharing Expenditures) Current (a)	Column A Capital (b)	Column B — Amounts ACTUALLY expended from Revenue Sharing funds (see instruction 4 and 5) Current (c)	Column B Capital (d)	Column C — Amounts budgeted from Revenue Sharing funds (see instruction 4 and 5) Current (e)	Column C Capital (f)
1. Finance and general administration						
2. Education						
3. Libraries						
4. Welfare						
5. Hospitals						
6. Health						
7. Parks		13,000		4,037		
8. Police		[redacted]		[redacted]		
9. Fire						
10. [illegible]						
11. Sewerage						
12. Other operations						
13. Parks and recreation		40,000		13,674	7	
14. Utility systems – Gross revenue						
15. Interest on general debt						
16. Payment of principal on debt						
17. All other – Specify: Public Safety		[redacted]		[redacted]		

Remarks

Part VI — CERTIFICATION – I/We certify that the data contained in this report are accurate to the best of my knowledge and belief.

Signature of Official

Finance Director

Telephone: Area code 817, Number 645-2617, Extension 63

Date: November 20, 1980

Page 4

Part IV CASH AND INVESTMENT ASSETS AT END OF FISCAL YEAR

Type of asset	Amount at end of fiscal year – Book value: Held in purpose funds, as defined below (A)	Held in trust funds, as defined below (B)	Held in all other funds, except for cash shown in Column B (C)
1. Cash and deposits – Cash on hand and deposits, and time or savings deposits	11,826		81,350
2. Federal securities – Obligations of U.S. Treasury (including short-term notes) and Federal Financing Bank			
3. Federal agency securities – Obligations of government-owned agencies (including CCC, Export-Import Bank, FHA, GPMI, Postal Service, and TVA			
4. State and local government securities			
5. Other securities – Bonds, notes, mortgages, etc., not included in the foregoing classes. Include the following privately owned Federal agencies: FHLB, FLB, FNMA, banks for cooperatives, and Federal intermediate credit banks. Exclude accounts receivable, value of real property, and any other nonsecurity assets.			

Part V EXPENDITURES OF GENERAL REVENUE SHARING AND ANTIRECESSION FISCAL ASSISTANCE FUNDS 44 2 126 003 Deduct interest and other expenditures (that exceed Column B) and other expenditures (not from funds listed in Column C) DO NOT INCLUDE expenditures made from any other sources. Deduct Expenditures From Non-Entitlement Funds Deduct Capital Expenditures Deduct Expenditures for Construction Deduct Interest Expenditures Deduct Expenditures for Capital Improvements Deduct Expenditures for Capital Improvements Deduct Expenditures for Capital Improvements

Plaintiffs' Exhibit No. 10

[LETTERHEAD OF TEXAS DEPARTMENT OF HEALTH]

July 21, 1980

Mr. David Southern
826 Thorp Springs Road
Granbury, Texas 76048

SUBJECT: Residence at 201 Featherstone; Cleburne, Texas

Dear Mr. Southern:

This letter will summarize the thought and outcome of our meeting in Cleburne of July 17th concerning the conversion of the above referenced residence to an MR-I facility.

This residence is of frame construction with the exterior materials consisting of both wood and stucco. The roof is composition shingles. It is located across the street from Cleburne Junior High School on the corner of Featherstone and Buffalo Streets, approximately one-half mile from the city square. I would assume the fire protection/response time to be as adequate as anywhere in the city.

The building appears to be basically sound, but does need some repair and maintenance as listed elsewhere in this letter. It is understood that you intend to request certification for thirteen residents and you have verified the area (sq. ft.) requirements for this number of people. You also declared your intentions to remodel the large bath into one full bath and one half-bath with separate hall entries. The wall finishes in the existing smaller bath should be changed to a more durable, sanitary material, also, such as ceramic tile and/or vinyl wall covering. New tub and shower enclosures could be fiberglass, as discussed.

The following list of specific items were discussed with you at the site:

1. In remodeling, change the bathroom wall finishes to ceramic tile or use fiberglass tub/shower enclosures as discussed.

2. New carpet is needed in certain areas.
3. All door latch sets must be changed out to a type that does not need a key to unlock from the interior.
4. The gas-fired water heater must be enclosed and combustion air supplied to it from the exterior.
5. The stucco needs repairing, the brick chimneys need repointing, and the exterior wood siding must be painted.
6. An N.F.P.A. 72 fire alarm system must be installed as recommended in the "guidelines for fire alarm systems for MR-I facilities".
7. A gas leakage test must be performed on the facility (This is an annual requirement), and a letter of documentation furnished by the tester must be kept on file at the facility.
8. The gas heater must be provided combustion air from the exterior.
9. The building needs re-roofing and some of the decking and soffit material should be replaced as required.

I feel that this house can make an adequate MR-I facility with attention given to these factors and with the proper program. If we can be of further service, please let us hear from you.

Very truly yours,

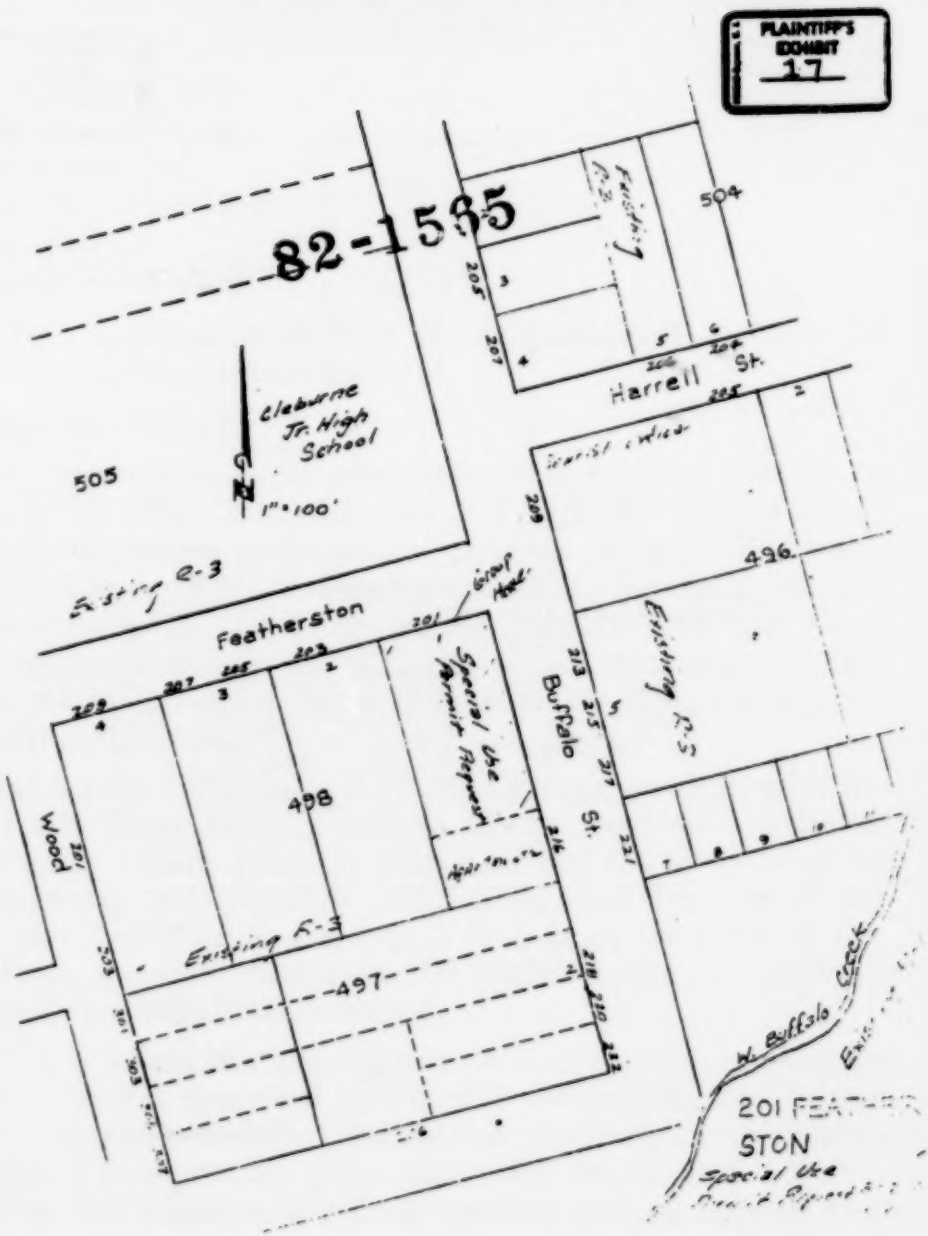
Clements C. Koehler
Architect
Life Safety Code Division

Enclosures

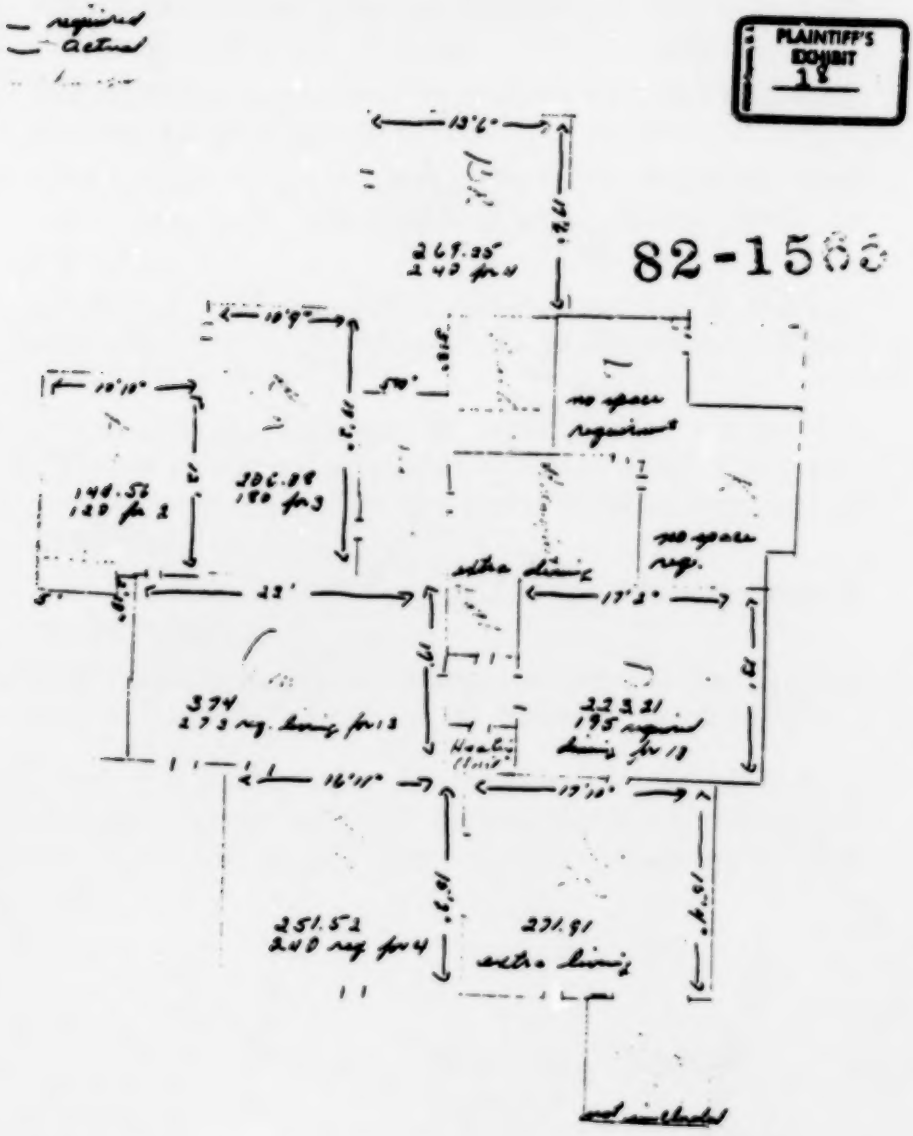
CCK/djg

cc: Randy Rickels, Chief Architect — MR Program, Life Safety Code Division file

Plaintiffs' Exhibit No. 17



Plaintiffs' Exhibit No. 18



Plaintiffs' Exhibit No. 28

[LETTERHEAD OF TEXAS DEPARTMENT
OF HUMAN RESOURCES]

November 4, 1981
Mr. Renea Hicks
Advocacy, Inc.
5555 N. Lamar Blvd.
Suite K-109
Austin, Texas 78751

Re: Application of Rule No. 326.35.03.004 to Cleburne Living Centers, Inc.

Dear Mr. Hicks:

The above referenced rule, which was initially adopted on July 13, 1981, indicated that ICF-MR providers who had applications for participation pending on that date would have 120 days to meet the requirements for certification to participate in the program. As published in the Texas Register on August 18, 1981, this requirement was described as giving providers "until November 10, 1981, to complete their certification."

Our records reflect that the provider you represent, a facility at 201 Featherston, Cleburne, Texas, had an application pending before July 13, 1981, and had taken some of the necessary steps toward certification, but because of litigation involving the zoning ordinance of the City of Cleburne, some certification requirements cannot be completed until this litigation is resolved.

This is to confirm the department's interpretation that the time period described in the rule for meeting certification requirements is tolled during the pendency of such litigation. Consequently, your client will be allowed 120 days after the litigation has been resolved and all appeals have been exhausted to meet certification requirements. If such requirements are met within this time period, the facility will be considered within the class of facilities which were certified under this rule.

Sincerely,

Marlin W. Johnston
jbm

Defendants' Exhibit No. 10

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Resources Intermediate Care Facility for Mentally Retarded Eligibility for Participation 326.35.03

(Editor's note: Because the Texas Department of Human Resources' rules have not yet been published in the Texas Administrative Code (TAC,) they do not have designated TAC numbers. For the time being, the rules will continue to be published under their Texas Register Division numbers. However, the rules will be published under the agency's correct TAC title and part.)

The Texas Department of Human Resources proposes new Rule 326.35.03.005 in its rules for Title XIX Intermediate Care Facilities for the Mentally Retarded (ICF-MR) Program. The rule outlines requirements for ICF-MR provider applicants, with the exception of the Texas Department of Mental Health and Mental Retardation state school ICF-MR providers, to improve program administration. The rule presents criteria for facility size, site location, documentation of need, and programmatic services. These criteria provide greater assurance that facilities will be a normal residence with access to programmatic resources, that facilities will be well-integrated into the local community, and that facilities will meet a service need in coordination with other mental retardation/developmental disability service providers. These outcomes are of benefit to both developmentally disabled client consumers and the communities in which the facilities will be located.

The rule has been approved by the ICF-MR Executive Committee, representing private providers, developmental disability advocacy organizations, state school providers, the Texas Department of Health, Texas Education Agency, Texas Department of Mental Health, and Texas Department of Human Resources. This rule excludes Texas Department of Mental Health and Mental Retardation state school providers. This exclusion is based on Article II, § 4 (a), of the 1981-1982 Appropriations Bill

(House Bill 656). This special provision states that the Texas Department of Mental Health and Mental Retardation shall maximize the amount of medical assistance paid on behalf of patients in state hospitals for mental disease and in state schools for the mentally retarded.

David Hawes, director of programs budget and rate setting, has determined that for the first five-year period the rule will be in effect, there will be fiscal implications as a result of enforcing or administering the rule. Savings to the state are estimated to be $525,951 for fiscal year 1982; $6,681,215 for fiscal year 1983; $14,546,832 for fiscal year 1984; $21,834,634 for fiscal year 1985; and $31,586,237 for fiscal year 1986. There is no estimated additional cost nor is there any estimated loss or increase in revenue. The proposal has no fiscal implications for units of local government.

Mr. Hawes has also determined that the public benefit anticipated as a result of enforcing the rule as proposed will be the limitation of uncontrolled growth in the program. There are no economic costs to persons required to comply with the rule as proposed.

Written comments are invited and may be sent to Susan L. Johnson, administrator, Policy Development Support Division–340, Texas Department of Human Resources 153-B, P.O. Box 2960, Austin, Texas 78769, within 30 days of this publication.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

J. B. McReynolds
December 22, 1981

The new rule is proposed under Title 2 of the Texas Human Resources Code, Chapters 22 and 31, which authorize the department to administer public assistance.

.005. Provider Applications.

(a) Effective May 1, 1982, all applications (I, V, VI) for participation in the ICF-MR Program, with the excep-

tion of state school ICF-MR providers, must meet the following requirements.

(1) Requested certification will be limited to a maximum of six beds per facility, whether the facility is currently certified or whether the request is for certification for a new facility.

(2) The proposed facility will be located within a given community according to the following specifications.

(A) The proposed facility must be located in an incorporated city which is subject to special use permit requirements, local zoning, and/or occupancy code requirements and must be noncontiguous to an already existing facility.

(B) No other ICF-MR residential facility is located within the same neighborhood within a three-mile radius.

(C) Access to community resources, such as shopping, transportation, recreation sites, is documented (as appropriate to level of client).

(3) A needs assessment has been conducted to include the following.

(A) Identification is made of the number of developmentally disabled persons residing in the community and surrounding geographic area (defined in assessment) that can benefit from the services provided by this facility.

(B) Other ICF-MR residential facilities, if any, located within the same community and/or geographic area as identified by name. Number and level of clients served is also stated.

(C) If the facility will serve the mentally retarded, letters are obtained from at least the superintendent of the state school and the executive director of the local MH/MR center (if applicable) in whose catchment area the proposed facility is located. Letters from the state school and community center should include a statement as to the number

of persons who will meet the basic admission criteria to the faciilty. The applicant could also provide the number of potential referrals from other state schools and/or MH/MR programs according to program location.

(D) In the event that the facility will serve clients other than the mentally retarded, the provider will obtain letters from the appropriate referral sources.

(4) A written description is submitted of the client group to be served, including admission criteria.

(5) A description is developed of the programmatic support services (as defined by Code of Federal Regulations 442.400) which will be required by the clients served. Copies of letters of intent, memoranda of understanding, or contracts accompany the description for each service identified.

(b) Subsequent to the receipt by the Texas Department of Mental Health and Mental Retardation of the application for participation in the ICF-MR Program and prior to the request for a certification survey by the Texas Department of Health, the Texas Department of Mental Health and Mental Retardation will meet the applicant to determine that the requirements in this rule have been met. The contract for services is dependent on the satisfactory compliance with these criteria.

Issued in Austin, Texas, on December 29, 1981.

TRD-819413 Marlin W. Johnston
Commissioner
Texas Department of Human Resources

Proposed date of adoption: February 8, 1982
For further information, please call (512) 441-3355, ext. 2037.

Defendants' Exhibit No. 12

1(0-480-001-1 | DEPARTMENT OF TAXATION | 22 |

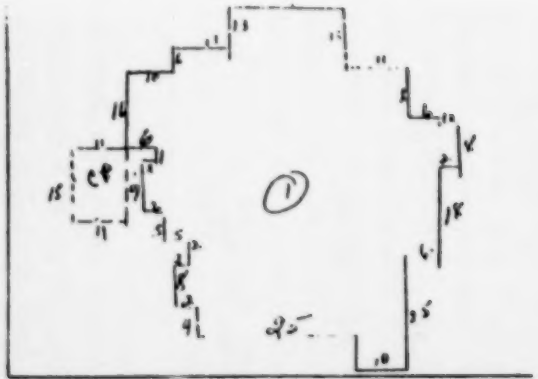
LOT or ABSTRACT	BLOCK or TRACT	ADDITION/SURVEY	ACRES
N 2/3 of Lot 1	498	Original Cleburne	

OWNERSHIP	MAILING ADDRESS	VOL.	PAGE	DATE	CONSID.
Turner, Mrs. B. H.					
McWhirter, Henry C.	201 Featherstone	652	655	11/74	
LAHMAN JANICE A	Rt 1 Box CLEBURNE TX DT 386/236				

LIENHOLDER	ADDRESS	VOL.	PAGE	DATE	CONSID.

DEFENDANT'S EXHIBIT NO. 12

	Concrete	Area	Stories	Yr. Built	1918
	Conc Blk	Finished	Window Unit	1917	
	Brick	Unfinished	Central H/A	CLASS	
	Pier-Beam		All Electric		
	Post		Fireplace	(4w) 5	
		INTERIOR		UTILITIES	
EXTERIOR		Sheetrock		Water	
Rock	ROOF	Paneled	PLUMBING	Sewer	
Frame	Comp	Paper	No. Baths	Elec.	
Brick Ven	Wood Shgl.	Painted	No. R Rooms	Gas	
Stone Ven	Tar-Gravel			All Util.	✓
Hayshite Blk	Metal				
Stucco		FLOOR	CONDITION		
Asbestos	Galde	Pine	Good	ST-ROAD	
Metal	Hip	Hardwood	Average	Paved	✓
Steel Frame	Flat	Concrete	Poor	Gravel	
Conc Tilt	Gambrel	Carpet	EXTRAS	Dirt	
Masonry	Mansard	Asph. Tile	Intercom	Curb	
Siding	Shed	Dirt	Yard Light	Sidewalks	
			Leaded Glass		



STREET ADDRESS:

YEAR	RENDERED VALUE	ASSESSED VALUE
19		
19 70		5490
19 78	12175	12450
19		
19		
19		
19		
19		
19		
19		
19		

STRUCTURE TYPE	SQ. FOOTAGE	UNIT PRICE	REPR. COST	% GOOD	VALUE
Residence	2510	$ 800	$ 2211	40	$ 1
C P	165	$ 302	$ 22		$ 12
Fl. Kit.		$	$ 100		$ 9
Ext Bath		$	$ 50		$ 37
		$	$		$

DATE ISSUED	PERMIT NO.	AMOUNT

YEAR	LOT SIZE	UNIT PRICE	VALUE
19			$
19			
19			
19			
19			

TOTAL IMPROVEMENT VALUATION..... $

TOTAL LAND VALUATION ..... $

TOTAL APPRAISED ..... $

[R. Vol. I, p. 238]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. CA3-80-1576-F

CLEBURNE LIVING CENTER, INC., ET AL.

V.

CITY OF CLEBURNE, TEXAS, ET AL.

ORDER

On or about April 28, 1982 this Court took the merits of this bench trial under advisement. The Court has preliminarily concluded its findings of fact and the research related to its conclusions of law. Nevertheless, at this time the Court is troubled by Plaintiffs claims brought under the Mentally Retarded Persons Act of 1977, TEX.REV.CIV. STAT.ANN. art. 5547-300, § 7. This, of course, is the first claim for relief which the Court must reach in the proper order of things. Section 7 of the Act, entitled "Right to least restrictive living environment," provides as follows:

> "Every mentally retarded person shall have the right to live in the least restrictive setting appropriate to his individual needs and abilities. This includes the person's right to live in a variety of living situations, such as the right to live alone, in a group home, with a family, and in a supervised, protective environment."

It would be a mild understatement to say that the substantive rights guaranteed by section 7 are in issue in this litigation. Certainly, section 7 would have to be construed in light of the zoning powers granted by the legislature to cities and incorporated villages, see TEX.REV.CIV.STAT. ANN. art. 1101a-j, and a delicate balance struck. Given that the Act has never before been construed by the courts of Texas with reference to zoning powers, the Court is loathe

to decide Plaintiffs' rights under the virginal act. Depending upon the proper construction to be given section 7, and the related remedial sections of the Act, see TEX.REV.CIV. STAT.ANN. art. 5547-300 §§ 63-67, a decision of Plaintiffs' federal statutory and constitutional claims could be unnecessary. [R. Vol. I, p. 239] As a result of the newness and related uncertainty regarding the reach of the Act, and the general administrative framework accompanying the Act, it appears to the Court that both *Pullman and Burford* abstention may be appropriate. *See Railroad Commission of Texas v. Puliman*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). This case has, however, gone to trial and the Court is mindful that this is a factor to be considered under the abstention doctrines. Nevertheless, the Court is of the opinion that the case presents "exeptional circumstances." Abstention with regard to the Mentally Retarded Persons Act has never heretofore been made an issue in this case. Instead, Defendants sought abstention on grounds that Texas provides Plaintiffs with a forum for determinations as to the proper construction of the Cleburne ordinance, and whether or not the ordinance is arbitrary and capricious under Texas law. The Court refused to abstain on those grounds and remains convinced that such a refusal is proper under federal law.

Given the above discussion, the Court has concluded that the parties should address the issues raised by the Court in this Order prior to a formal ruling by the Court. Accordingly, the respective sides shall submit short letter briefs with the Court no later than August 12, 1982. A hearing on the issues is scheduled for Friday, August 13, 1982 at 11:00 a.m.

So ORDERED this 28th day of July, 1982.

Robert W. Porter
UNITED STATES DISTRICT JUDGE

[R. Vol. I, p. 241]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-80-1576-F

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs

vs.

CITY OF CLEBURNE, TEXAS, et al.,
Defendants

STIPULATION OF VOLUNTARY DISMISSAL OF PLAINTIFFS' PENDENT STATE CLAIMS

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, it is hereby stipulated that the plaintiff's pendent state claims in the above styled and numbered cause, as set forth in paragraphs 35-37 and 40-42 of the First Amended Complaint, are dismissed with prejudice.
Dated: August 9, 1982

RENEA HICKS

RENEA HICKS
Advocacy, Inc.
5555 N. Lamar, Suite K-109
Austin, Texas 78751
(512) 475-5543

ATTORNEY FOR PLAINTIFFS

EARL LUNA

EARL LUNA
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

ATTORNEY FOR DEFENDANTS

[R. Vol. I, p. 240]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-80-1576-F

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs

vs.

CITY OF CLEBURNE, TEXAS, et al.,
Defendants

ORDER OF DISMISSAL

Pursuant to the Stipulation of Voluntary Dismissal of Plaintiffs' Pendent State Claims under Rule 41(a)(1)(ii), F.R.C.P., filed on August 9, 1982, it is hereby

ORDERED that the plaintiffs' pendent state claims in this action, as set forth in paragraphs 35-37 and 40-42 of the First Amended Complaint, are dismissed with prejudice to their refiling.

SIGNED and ENTERED this 9th day of August, 1982.

Robert W. Porter
UNITED STATES DISTRICT JUDGE

APPROVED AS TO
FORM AND SUBSTANCE:

RENEA HICKS
Attorney for Plaintiffs

EARL LUNA
Attorney for Defendants

[R. Vol. I, p. 242]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLEBURNE LIVING CENTER, INC., et al.

vs.

CITY OF CLEBURNE, TEXAS, et al.

NO. CA3-80-1576-F

MEMORANDUM OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. Plaintiff Cleburne Living Center, Inc. (hereinafter referred to as "CLC") is a three shareholder Texas corporation organized for the purpose of establishing and operating supervised group homes for persons who are mentally retarded. The corporation is not a non-profit organization. It has leased a house at 201 Featherston Street in the City of Cleburne, Texas from Jan Hannah for the purpose of establishing a group home for thirteen mentally retarded adults at that address. On or about February 4, 1982, CLC changed its corporate name to Community Living Concepts, Inc., but the name change left unaffected all other aspects of CLC.

2. Plaintiff Jan Hannah is CLC's Vice President and holds one third of the corporation's outstanding stock. She is the owner of the house at 201 Featherston Street in the City of Cleburne, having purchased it in July, 1980, for the purpose of leasing it to CLC for the operation of a group [R. Vol. I, p. 243] home for persons who are mentally retarded.

3. Plaintiff Johnson County Association for Retarded Citizens (hereinafter Johnson County ARC) is a non-profit Texas corporation established for the purpose of advocating and representing the interests of the mentally retarded

residents of Johnson County. It has approximately two hundred (200) members, among whom are parents of mentally retarded children and adults, mentally retarded persons (at least one of whom, Sylvia Sims, is a potential resident of the home), special education teachers and educational diagnosticians employed by the Cleburne Independent School District, and other concerned Johnson County residents. As an organization, it supports the establishment of group homes, including the Featherston Street one, for persons who are mentally retarded.

4. Plaintiff Advocacy, Inc., is a non-profit Texas corporation formed to insure and protect the legal rights of persons who are developmentally disabled, including those who are mentally retarded persons. It is a statewide legal advocacy system affiliated with the State Bar of Texas and established pursuant to 42 U.S.C. § 6012. Among the rights for which Advocacy, Inc. advocates is the right of mentally retarded persons to live in group homes in community settings.

5. Defendant City of Cleburne is a municipal corporation established pursuant to the laws of the State of Texas. As a Texas municipal corporation, the city has certain powers and duties, among which are certain zoning powers.

[R. Vol. I, p. 244]

6. Defendant George W. Marti is the Mayor of the City of Cleburne. In conjunction with his duties as mayor, he is the chairman of the City of Cleburne City Council and a voting member of that council in case of ties.

7. Defendants J. T. Bass, Arval Martin, Jr., and Alfred Johns are elected, voting members of the City of Cleburne City Council which is empowered under Texas law to enact municipal zoning ordinances and which is responsible for granting or denying special use permits under the City of Cleburne zoning ordinance.

8. Defendant Robert Miller is the City Attorney for the City of Cleburne, responsible for the prosecution of violations of the City of Cleburne zoning ordinance.

9. In July, 1980, Jan Hannah purchased the lot and house located at 201 Featherston Street in Cleburne, Texas

(hereinafter sometimes referred to as the Featherston Street home). This property is officially described in Cleburne city records as the north two thirds of lot 1, block 498, of the City of Cleburne.

10. At the time of purchase by Jan Hannah, the Featherston Street home was in a district classified under Cleburne's zoning ordinance as an apartment house district. The use district also is called an R-3 zone. That zoning classification is still the same for the home at the time of trial.

11. On June 8, 1965, the City Council of the City of Cleburne enacted a zoning ordinance for the city which included for the first time in the city zoning ordinance the [R. Vol. I, p. 245] texts of §§ 8(6) and 16(9) of the current ordinance as they now read.

None of the current city council members of the City of Cleburne were members of the city council on June 8, 1965.

12. Under Section 8 of Cleburne's zoning ordinance, the following uses are all permitted uses in a district zoned R-3, including the district in which the Featherston Street home is situated:

(1) Any use permitted in District R-2.

(2) Apartment houses, or multiple dwellings.

(3) Boarding and lodging houses.

(4) Fraternity or sorority houses and dormitories.

(5) Apartment hotels.

(6) Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.

(7) Private clubs or fraternal orders, except those chief activity is carried on as business.

(8) Philanthropic or eleemosynary institutions, other than penal institutions.

(9) Accessory uses customarily incident to any of the above uses, and located on the same lot, not involving the conduct of a business or industry.

a. There shall be permitted such facilities as are customarily accessory to the operation of an apartment hotel when conducted and entered from within the building.

b. Private or storage garages, located as provided in District R-1 for private garages, may provide space for not more than one motor vehicle for each seven hundred and fifty (750) square feet of lot area. No business occupation or services connected with motor vehicles, except washing occupant autos shall be permitted.

[R. Vol. I, p. 246]

(10) Signs as provided in Section 21.

13. Under Section 16, subdivision 9, of Cleburne's zoning ordinance, "[h]ospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions" are listed as uses requiring the issuance of a special use permit by the Cleburne city council before such use of property in the city may be made.

14. Under Cleburne's zoning ordinance, each special use permit issued is good for only one year.

15. On July 28, 1980, after being told by the responsible city officials of the necessity for doing so if they wished to operate the Featherston Street home as proposed, Jan Hannah and Bobbie Northrop paid the city $40 to apply for a special use permit. The permit was sought to operate the Featherston Street home as a "Residential Care facility for Mentally Retarded Adults".

16. On August 18, 1980, the city's Planning and Zoning Commission held a hearing and voted to deny the special use permit for the Featherston Street home.

17. Although it originally had planned to start operation of the Featherston Street home around October 1, 1980,

CLC, in the face of the zoning problems with the city, postponed the planned operational date to November 1, 1980.

18. On September 29, 1980, the City of Cleburne, through its then Assistant City Attorney, Robert T. Miller, Jr., sent a letter to Bobbie Northrop stating that a special use permit was required to operate the Featherston Street home and classifying the proposed use as a hospital for the [R. Vol. I, p. 247] feebleminded. Bobbie Northrop received this letter shortly after it was sent.

19. On October 14, 1980, the City Council of Cleburne held a public hearing on the special use permit application for the Featherston Street home and, in a three to one vote, voted to deny the permit application.

20. The Featherston Street home will house thirteen mentally retarded adults and will be operated by CLC as a Level I Intermediate Care Facility for the Mentally Retarded (hereinafter sometimes referred to as an ICF-MR) under extensive regulations and guidelines established and administered by the United States Department of Health and Human Services, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health. CLC plans to comply with all applicable and valid statutes, regulations, codes, and ordinances.

21. The structure at 201 Featherston Street is a large, one story frame house containing a living room, an alcove, a dining room, a breakfast room, a kitchen, an attic, a laundry room, four bedrooms, a den, and two baths, with a half bath to be added. It is on a corner lot, and there are front, side, and back yards, as well as a large front porch. Across the street to the north of the Featherston home is a public junior high school which numbers among its students about thirty mentally retarded children between the ages of nine and twenty one years. Directly behind the Featherston home to the south is a two story apartment house. A dentist's office is [R. Vol. I, p. 248] on the corner northeast of the Featherston home.

22. The people who will live in the Featherston Street home will be men and women eighteen years of age or older who are mildly or moderately mentally retarded. They will be completely ambulatory.

23. The Featherston Street home will have twenty four hour supervision, divided basically into eight hour shifts. Besides handling administrative matters, some cooking, and some cleaning chores, the staff will work with the mentally retarded residents to train and teach them in such areas as kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities. The program for each resident will be flexible, depending on his or her needs, and will be based on an individual program plan prepared for each resident of the group home by an interdisciplinary team. Although a registered nurse will visit the home once a month, there will be no licensed nursing or medical staff in the home or employed by CLC. The residents will have jobs in the community and in a work activity center. They probably will not have private automobiles. Their stay at the Featherston Street home will be voluntary, and its length will be indeterminate.

24. If the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.

25. Beginning in fiscal year 1980 (which started on October 1, 1979) and continuing in each of the next two fiscal years, the City of Cleburne has been a recipient of federal financial assistance, including financial assistance under the State and [R. Vol. I, p. 249] Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221, *et seq.* (hereinafter referred to as the Revenue Sharing Act). The city received revenue sharing funds equalling $203,361 in fiscal year 1980, $203,433 in fiscal year 1981, and at least $51,357 thus far in fiscal year 1982.

26. The city's city council is the principal allocator of revenue sharing funds within the city, and it is responsible to the federal Office of Revenue Sharing for the accounting of the receipt and use of revenue sharing funds.

27. Revenue sharing funds have been spent in the following ways, among others: (a) road construction; (b) the purchase of capital equipment for the city's department of public works; (c) the purchase of capital equipment for City Hall; (d) water utility systems; (e) parks and recreation; (f) debt service; and (g) library materials.

28. A civil rights complaint against the City of Cleburne, alleging that the zoning ordinance and the denial of the special use permit that are at issue in this case violate the Revenue Sharing Act antidiscrimination provisions, was filed with the federal Office of Revenue Sharing by Cleburne Living Center, Inc., on its own behalf and on behalf of the mentally retarded potential residents of the Featherston Street home. The Office of Revenue Sharing received the complaint on September 29, 1981, and, as of March 22, 1982, a determination had not been made or issued by that federal office with respect to the complaint.

[R. Vol. I, p. 250]

29. The city council's vote on October 14, 1980, as well as the city Planning and Zoning Commission's earlier vote on August 18, 1980, to deny a special use permit for the Featherston Street group home was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded.

30. Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

31. No group homes or hospitals for persons who are mentally retarded are in Cleburne. One is, however, located

in Keene, Texas. Keene is also in Johnson County and is approximately 15 minutes by automobile from Cleburne.

32. Persons who are mentally retarded historically have been subjected to exclusion from the political process and have been isolated in remote, stigmatizing living arrangements.

33. None of the named Plaintiffs themselves are developmentally disabled.

34. Members of the City Council of Cleburne considered the following factors in their decision to deny Plaintiffs a special use permit for the house at 201 Featherston Street:

> a. the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston;
>
> [R. Vol. I, p. 251]
>
> b. the location of a junior high school across the street from 201 Featherston;
>
> c. concern for the fears of elderly residents of the neighborhood;
>
> d. the size of the home and the number of people to be housed;
>
> e. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;
>
> f. the home's location on a five hundred (500) year flood plain; and
>
> g. in general, the presentation made before the City Council.

35. Plaintiffs were given a full and fair opportunity to voice their views to the City Council concerning their application for a special use permit.

36. In their operation of the group home, Hannah and CLC planned to obtain fees from the residents, and in the

event that the residents were unable to pay, subsidies from Medicaid. A Level I Intermediate Care Facility program in Texas is a Medicaid funded program.

37. ICF-MRs are required by the State of Texas to meet certain certification requirements set forth in Plaintiffs' Exhibit 25. CLC preliminarily sought certification of its proposed facility. On or about July 21, 1980 the Texas Department of Health indicated to Mr. David Southern, a one-third shareholder in CLC, that the house at 201 Featherston would be an "adequate" ICF-MR Level I facility provided that certain repairs and modifications were made to the house. Because of the onset of this litigation, however, the requirements for certification were not completed and the Texas Department of Health has stated its intention to toll the one-hundred [R. Vol. I, p. 252] and twenty day period for the completion of the requirements pending the outcome of the litigation.

38. Subsequent to CLC's application for certification of the ICF-MR in Cleburne, the Texas Department of Human Resources issued new regulations with reference to ICF-MRs. The new regulations (see Defendant's Exhibit 10) state that certification as an ICF-MR will be limited to "six beds per facility." David Southern claims that state officials have agreed that the new regulation does not apply to the Cleburne facility retroactively.

39. Currently, the house at 201 Featherston will require approximately $8500.00 in repairs and modifications in order to meet certification requirements that have gone into effect since October of 1981.

40. The lease of 201 Featherston from Jan Hannah to CLC requires that the premises be used for "a residential training facility for the adult mentally retarded" and no other purpose. Because of the denial of the special use permit, in January of 1981 Hannah and CLC agreed to modify the terms of the lease. CLC continues to pay Hannah $600 per month for the future right to utilize the lease as

originally planned. The original lease called for the payment of $1300.00 per month.

41. There is no evidence that any of the federal funds received by the City of Cleburne pursuant to the Revenue Sharing Act are used to exercise the city's zoning powers. Further, the evidence is clear and convincing that, of the [R. Vol. I, p. 253] federal funds received by the city, none are used to exercise the city's zoning powers.

42. At all times material to the actions described above, each named individual Defendant was serving in his official capacity as an employee of the City of Cleburne, Texas. Further, at all times material to the actions described above, each named individual acted at all times in the due performance of his official duties and, in good faith, believed that he was carrying out those duties in a proper manner.

II. CONCLUSIONS OF LAW

A. Introdution

Plaintiffs predicate this action upon the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221 *et seq.*, (hereinafter Federal Revenue Sharing Act) and the Fourteenth Amendment to the United States Constitution. In particular, Plaintiff CLC claims that Defendants have violated the nondiscrimination provision of the Federal Revenue Sharing Act, 31 U.S.C. § 1242(a)(1),[1] which incorporates the prohibitions found in the Rehabilitation Act, 29 U.S.C. § 794, pertaining to "otherwise qualified handicapped individual[s]." The Defendant City challenges CLC's standing to bring the claim and further asserts § 1242(a)(2)(A) of the Revenue Sharing Act[2] as a defense. All Plaintiffs assert Fourteenth Amendment challenges to the city's zoning ordinance, as written and as applied. In particular, Plaintiffs claim the acts of the Defendants amount to a denial of equal protection, a denial of procedural and substantative due process, and an infringement of Plaintiff's constitutional rights to travel [R. Vol. I, p. 254] and freedom of association. Defendants challenge the stand-

ing, both constitutional and prudential, of these litigants to assert the claims in question. In the alternative, Defendants assert that the ordinance as written and in operation suffers from no consitutional infirmities.

B. The Revenue Sharing Act and Rehabilitation Act Claim

1. CLC's standing

CLC raises this claim in its own right and in behalf of the group home's potential residents. The Revenue Sharing Act provision conferring standing for private civil actions states in pertinent part

> "Whenever . . . a unit of local government . . . has engaged or is engaging in any act or practice prohibited by this chapter [e.g., 31 U.S.C. § 1242(a)(1)] . . . a civil action may be instituted by the person aggrieved . . . ."

31 U.S.C. § 1244(a). *(emphasis added)* It is undisputed that CLC has properly exhausted its administrative remedies prior to the institution of this action. Congress, of course, may not abrogate the basic Article III standing requirements by statute. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 60 L.Ed.2d 66 (1979). Yet, it is apparent that CLC has shown injury in fact which can be redressed if the requested relief is granted. Further, the Court is ever mindful of the remedial purposes of the Act, and is hesitant to give the Act a narrow reading in light of its purposes. It is also without doubt that the interests asserted by CLC in this action fall within the "zone of interests" sought to be protected by the statute. *See Ass'n of Data Processing Service Organizations, Inc. v. Camp*, [R. Vol. I, p. 255] 397 U.S. 150, 25 L.Ed.2d 184 (1970). The Court finds further support in recent Supreme Court cases addressing the issue of statutory standing under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, *Havens Realty Corp. v. Coleman*, —— U.S. ——, 71 L.Ed. 2d 214 (1982);

Gladstone Realtors, supra; Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 34 L.Ed. 2d 415 (1972). Defendants contend, however, that none of the Plaintiffs are "otherwise qualified handicapped individual[s]" and that therefore they cannot be "persons aggrieved" within the meaning of the Act. The Court does not read this limitation into the Revenue Sharing Act. Instead, the Court concludes that the term "person aggrieved" indicates a willingness on the part of Congress to extend standing under the Act to all entities which can satisfy traditional Article III requirements. For the reasons set forth below, the Court concludes that CLC satisfies those requirements, including the prudential requirements for *jus tertii* standing in behalf of mentally retarded adults who are potential residents, or "clients" of the group home. In sum, CLC has standing to bring this action in its own right and on behalf of potential residents of the group home.

2. Section 1242(a)(2)(A). Defendants contend that they have demonstrated by clear and convincing evidence that the city's zoning activities are not funded in whole or in part by federal funds provided pursuant to the Revenue Sharing Act. There can be little doubt from the literal language of the Act that its prohibitions are "program [R. Vol. I, p. 256] specific." *Cf. North Haven Board of Education v. Bell*, —— U.S. ——, 50 U.S.L.W. 4501 (1982); *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980). It is undisputed that the burden of the section 1242(a)(2)(A) defense falls upon Defendants. Defendants rely exclusively upon Plaintiffs' Exhibit Five (5), a breakdown of the city's expenditures of Revenue Sharing Act funds for the years 1979-1981. The exhibit shows that the city has spent the funds in question upon roads, police, parks and recreation, water and debt service. Apparently not all of the funds have been expended as there is a net positive balance. It is, of course, true that the city council has been the official recipient and "trustee" of the funds. (But this fact, without more, fails to rebut the force of Plaintiff's Exhibit Five.

To conclude that the prohibitions against discrimination incorporated into the Revenue Sharing Act from the Rehabilitation Act are applicable to the mere exercise of the city's zoning powers, without any further proof of a nexus between the exercise of those powers and the disbursement of Revenue Sharing Act funds, would eviscerate the "program specific" nature of the Act. In sum, Plaintiffs attempt to place a square peg in a round hole. The Defendants have shown by clear and convincing evidence that the zoning decisions in question were not funded in whole or in part with Revenue Sharing Act funds. Hence these claims will be dismissed on the merits.

C. THE CONSTITUTIONAL CLAIMS

1. Standing

There are four named Plaintiffs in this [R. Vol. I, p. 257] action who assert standing to litigate the constitutional claims: CLC; Jan Hannah; Johnson County Association for Retarded Citizens; and Advocacy, Inc. Only Hannah and CLC claim a right to money damages. All Plaintiffs seek *jus tertii* standing on behalf of adult mentally retarded citizens who are potential residents at the group home.

CLC and Jan Hannah have clearly shown that they have standing in their own right to assert the constitutional claims. Each has suffered injury in fact as a direct result of Defendants' conduct. Each has a personal stake in the outcome sufficient to assure the "concrete adverseness" required by Article III. Finally, the requested injunctive relief would ameliorate the particular alleged injury. For these reasons then, *see e.g. Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 50 L.Ed 2d 450 (1977), *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975), *Baker v. Carr*, 369 U.S. 186, 7 L Ed.2d 663 (1962), the Court concludes CLC and Hannah may bring this action in their own right.

In addition, the Court is also of the opinion that CLC and Hannah have standing to litigate the constitutional rights of mentally retarded citizens who are potential residents of the proposed group home. Limitations on a litigant's

assertion of *jus tertii* standing are not constitutionally mandated, but instead stem from a salutory "rule of self restraint." *Craig v. Boren*, 429 U.S. 190, 50 L Ed.2d 397 (1976). CLC and Hannah are virtually indistinguishable from [R. Vol. I, p. 258] the vendors in *Carey v. Population Services Int'l.*, 431 U.S. 678, 52 L.Ed.2d 675 (1977), *Craig, supra*, and *Eisenstadt v. Baird*, 405 U.S. 438, 31 L Ed.2d 349 (1972). On this authority the Court concludes Hannah and CLC are proper litigants to champion the constitutional rights of adult mentally retarded citizens who are potential residents or "clients" of the group home. *See also Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1036 (5th Cir. 1980).

The Court reaches a different conclusion with regard to the Johnson County Association for Retarded Citizens. The record is devoid of any sufficient injury, economic or non-economic, to the Association which would justify its inclusion into this litigation. *See Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636 (1972). Further, there is no evidence that the Defendants' conduct has in any way adversely affected the associational ties of the association's members. Id. For these reasons then the Johnson County Association for Retarded Citizens will be dismissed from this litigation.

Advocacy Inc., an independent state agency created pursuant to 42 USC § 6012, also as standing to represent adult mentally retarded citizens who are potential residents of the group home. *See Goldstein v. Coughlin*, 83 FRD 613 (W.D. N.Y. 1979); *Naughton v. Bevilaegua*, 458 F.Supp. 610, 617 (D.R.I. 1978). *But see Developmental Disabilities Advocacy Center, Inc.*, 521 F.Supp. 365 (D.N.H. 1981). This is especially appropriate where, as is true in the instant case, Hannah and CLC have shown that they are proper litigants [R. Vol. I, p. 259] according to constitutional and prudential standing requirements. Advocacy Inc., however, is not a proper litigant insofar as it purports to represent the individual interests of Hannah and CLC.

2. Equal Protection

Plaintiffs assail the city's zoning ordinance, as written and as applied, on grounds that it denies mentally retarded citizens their rights to equal protection. In accordance with traditional equal protection analysis, the Court first notes that the ordinance in question and the denial of the special use permit do not impact upon any fundamental right guaranteed to Plaintiffs by the United States Constitution. Hence, the Court focuses upon whether the ordinance, as written and as applied, creates a suspect classification. There can be little doubt that Cleburne's zoning ordinance selectively discriminates against the "insane or feeble minded."

The traditional factors for the determination of a suspect class are found in *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 36 L Ed.2d 16 (1973). Although classification according to mental retardation has never been examined by the Supreme Court, *see Schweicker v. Wilson*, 450 U.S. 221, 67 L.Ed.2d 186 (1981), several lower courts have considered similar issues and arrived at conflicting results. For example, some Courts have rejected the contention that the mentally retarded are a suspect class, *Doe v. Colaulti*, [sic] [R. Vol. I, p. 260] 454 F.Supp. 621, 632 (E.D. Pa. 1978), *aff'd* 592 F.2d 704 (3rd Cir. 1979), *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973), while others have stated that the mentally retarded constitute a "quasi-suspect" class prompting a heightened standard of review. *Sterling v. Harris*, 478 F.Supp. 1046, 1053 (N.D. Ill. 1979), *rev'd on other grounds sub nom. Schweiker v. Wilson*, 450 U.S. 221, 67 L.Ed.2d 186 (1981). *Frederick v. Thomas*, 408 F.Supp. 823, 836 (E.D. Pa. 1976); *Fialkowski v. Schapp*, 405 F.Supp. 946, 958-59 (E.D. Pa. 1975) *(dictum)*. The Court is of the opinion that mental retardation is not a suspect or quasi-suspect class prompting strict or heightened judicial scrutiny. In support of its conclusion the Court adopts the reasoning of the Third Circuit Court of Appeals in *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979). Accordingly, Cleburne's zoning ordinance will be afforded a presumption of validity and upheld if it can

be shown to bear some rational relationship to the city's legitimate purposes or interests. *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 40, 55, 36 L Ed 2d 16, 47, 56 (1973).

Subjected to this limited standard of review, the Court finds that the ordinance, both as written and applied, passes constitutional muster. Certainly the city has a legitimate interest in the location of a group home intended for the purpose of housing thirteen adult mentally retarded citizens. Cleburne does not absolutely bar such concerns in its jurisdiction, but instead merely exercises authority with regard to the location of such a home. The location of the group home raises many legitimate concerns with the city [R. Vol. I, p. 261] and its residents. Such concerns were voiced in the political process leading to the denial of the special use permit. In particular, the Court focuses upon the legal responsibility of CLC and its residents, as well as the safety and fears of residents in the adjoining neighborhood. Opponents of the special use permit also viewed the number of residents and the particular structure in which they were to be housed with skepticism. It should be noted that subsequent to the denial of the permit, the State of Texas, through its Department of Health Resources, has proposed and adopted Rule 326.35.03.005 which limits its certification of ICF-MRs to those which have six beds per facility or less. In sum, the Court is constrained to conclude that the zoning ordinance as written and as applied to Plaintiffs, is rationally related to legitimate purposes and interests of the City of Cleburne. It is not arbitrary, capricious or irrational.

3. Due Process — Police Power

Plaintiffs contend that the City of Cleburne has exceeded its legitimate police powers by virtue of the zoning ordinance, as written and as applied. In particular, Plaintiffs assert the ordinance and the decision to deny a special use permit bear neither a rational nor substantial relationship to the public health, safety, morals, or general welfare. *See e.g. Village of Euclid v. Ambler Realty Co.*, 272 U.S.

365, 395 71 L.Ed. 303 (1926); *Couf v. DeBlaker*, 652 F.2d 585, 588 (5th Cir. 1981); *Wheeler v. City of Pleasant Grove*, 644 F.2d 99, 100 (5th Cir. 1981). The Supreme Court has recently noted that the power of local governments to zone and control [R. Vol. I, p. 262] land use is undoubted and that its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. *Schad v. Borough of Mt. Ephram*, 452 U.S. 61, 68 L.Ed.2d 671, 680 (1981). At this point it is appropriate to distinguish between the interests asserted by Hannah and CLC in their own right as opposed to the interests asserted in their representative capacity. Hannah and CLC have an economic property interest in their own right. In their representative capacity they assert alleged liberty interests on behalf of mentally retarded adults who are potential residents or clients of the group home. In *Schad, supra*, the Supreme Court stated that where property interests are at stake, the ordinance need only be rationally related to legitimate concerns and not deprive the owner of economically viable use of the property. 452 U.S. at 68. Where a protected liberty interest is at stake, the ordinance must be narrowly drawn and further a sufficiently substantial government interest. *Id.*

The Cleburne ordinance, with respect to the individual interests of Hannah and CLC suffers from no constitutional infirmity. As discussed in section 2 above, the ordinance is rationally related to legitimate concerns of the city. Further, it does not deprive the owners of economically viable use of the property. Accordingly, Cleburne's ordinance is without constitutional infirmity with regard to the property interests asserted by Hannah and CLC.

The exercise of the city's inherent police powers with respect to the liberty interests of potential residents of [R. Vol. I, p. 263] the group home requires a more lengthy discussion. It is important to bear in mind that all the City of Cleburne has done is to reject a potential site for a group home. As was discussed earlier, the Court has rejected Plaintiffs' contentions that mentally retarded citizens constitute a suspect class. Plaintiffs, however, additionally contend that

the ordinance and the decision to deny the special use permit, impinge upon freedoms of association and travel. The Supreme Court has rejected similar contentions in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8-9, 39 L.Ed.2d 797, 803-04 (1974). Cleburne has merely denied Plaintiffs the right to conduct their business at a specific location in the City. Other locations are available and the Court can find no impingement upon constitutionally guaranteed rights of association and travel. For these reasons, it appears that the "liberty interest" test set forth in *Schad*, *supra* is inapplicable to the facts of this case. Under the limited standard of review governing mere property interests, the Court has already concluded the ordinance and denial of the special use permit withstand scrutiny. Further, were the court to apply the heightened state of review enunciated in *Schad*, the Court would likewise approve of the ordinance and denial of the special use permit. Cleburne's interest in selectively locating homes for the mentally retarded is substantial — the evidence indicates a concern for not only the rights of adjoining landowners but also for the potential residents of the home. The ordinance is drawn as narrowly as possible to accomodate these interests.

[R. Vol. I, p. 264]

Finally, the Court notes that the facts of this case bear little resemblance to those in *Moore v. East Cleveland, Ohio*, 431 U.S. 494, 52 L.Ed.2d 531 (1977) and *State of Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 73 L.Ed. 210 (1928). In *Moore*, the Court emphasized the government's intrusion into the "extended family" living arrangement and concluded that the ordinance in question did little to further the interests claimed by the government. There has been no similar showing in the case at bar. In *Roberge*, the Court concluded that a governmental entity may not constitutionally delegate its entire zoning powers to the owners of adjoining land. Although the city council of Cleburne was heavily influenced by the opinions of adjoining landowners, it is abundantly clear that the city did not completely delegate its police powers. In sum, the Court concludes that the city's conduct was a proper and permissible exercise of its police powers.

4. Due Process — Vagueness

Plaintiffs also assail the Cleburne zoning ordinance on grounds that it is impermissibly vague. Noting that section 27 of the ordinance provides criminal penalties for its violation, Plaintiffs focus the Court's attention to the variance found in the two pertinent sections, §§ 8, 16, with regard to "home" and "hospital". Plaintiffs additionally offer the Court various hypothetical situations which could result in ambiguity under the city's zoning laws as a whole.

At the outset of its analysis, the court notes that on [R. Vol. I, p. 265] the facts of this case the ordinance does not "abut upon sensitive areas of basic First Amendment freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109, 33 L.Ed.2d 222, 228 (1972), [quoting *Smith v. Goguen*, 415 U.S. 556, 572-73, 39 L.Ed.2d 605 (1974)]. Accordingly the law does not demand the greater degree of specificity reserved for the protection of First Amendment freedom. *Parker v. Levy*, 417 U.S. 733, 41 L.Ed.2d 439 (1974). In fact, the ordinance in question is more appropriately characterized as an economic regulatory statute. The standard for its validity is set forth in *Parker, supra:*

> The stronge presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation.
>
> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

417 U.S. 733, 757, 41 L.Ed.2d 439, 458 (1974) [*quoting United States v. Nat'l. Dairy Corp.*, 372 U.S. 29, 32-33,

9 L.Ed.2d 561 (1963)]. Under this limited standard of review the Court finds that the ordinance withstands constitutional assault. The Court has little to no difficulty in construing sections 8 and 16 to include the proposed group home despite the minor variance of terms ("home" v. "hospital") therein. A person of ordinary intelligence can reasonably understand [R. Vol. I, p. 266] that sections 8 and 16 require a special use permit for the operation of a for-profit group home for mentally retarded adults. Any ambiguity is minute.

On the facts of this case, it is beyond peradventure that Plaintiffs received clear and sufficient notice of the city's prohibitions. Accordingly, there is some doubt as to whether Plaintiffs may raise the vagueness claims, especially in the absence of an impingement upon First Amendment freedoms. *See Parker v. Levy*, 417 U.S. 733, 756, 41 L.Ed.2d 439, 458 (1974) (one to whose conduct a statute clearly applies may not successfully challenge it for vagueness). In any event, it is amply clear that the Court need not engage in speculation concerning hypothetical fact situations and their disposition under the ordinance. In short, the Court concludes that sections 8 and 16 of the ordinance are not impermissibly vague. The Court is reminded of the Supreme Court's opinion in *Grayned, supra* where it was stated that "condemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110, 33 L.Ed 2d at 228-29.

5. Freedom of Association and Right to Travel

By these claims Plaintiffs would have the Court read much more into Defendants' conduct than the record reflects. Cleburne is merely exercising its inherent policy powers to approve or disapprove of the specific location of Plaintiffs' business endeavor. The city does not bar group homes for mentally retarded citizens from its jurisdiction and neither does it inhibit their rights to associate. In sum, mentally retarded citizens are free to live and associate in Cleburne, [R. Vol. I, p. 267] Texas. The city has merely pro-

hibited the establishment of a for-profit group home for 13 mentally retarded citizens at one specific location. As has been discussed above, the city has a significant and substantial interest in the ultimate location of the home. Plaintiffs' contentions are simply without merit.

D. Conclusions

The Court finds no statutory or constitutional infirmities in the Cleburne zoning ordinance, as written and as applied. Accordingly, judgment for Defendants on all claims will enter.

Signed and entered this 4th day of October, 1982.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

[R. Vol. I, p. 268]

1. 31 U.S.C. § 1242(a) (1):

No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a state government or unit of local government, which government or unit receives funds made available under subchapter I of this chapter. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualified handicapped individual as provided in section 794 shall also apply to any such program or activity. Any prohibition against discrimination on the basis of religion, or any exemption from such prohibition, as provided in the Civil Rights Act of 1964 or Title VIII of the Act of April 11, 1968, hereafter referred to as Civil Rights Act of 1968, shall also apply to any such program or activity.

2. 29 U.S.C. § 749: [sic]

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

[R. Vol. I, p. 269]

3. 31 U.S.C. § 1242(a) (2) (A):

The provisions of paragraph (1) of this subsection shall not apply where any State government or unit of local government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under subchapter I of this chapter.

[R. Vol. I, p. 270]

In The

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. CA3-80-1576-F

Cleburne Living Center, Et Al.

v.

City of Cleburne, Texas, Et Al.

JUDGMENT

This action came on for trial before the Court, Honorable Robert W. Porter, United States District Judge, and the issues having been duly tried and a decision having been rendered,

It is ORDERED and ADJUDGED that the Plaintiffs, Cleburne Living Center, Inc., et al., take nothing and that the action be dismissed on the merits.

Signed this 4th day of October, 1982.

/s/ Robert W. Porter

United States District Judge

CLEBURNE LIVING CENTER, INC., et al.,

Plaintiffs-Appellants,

v

CITY OF CLEBURNE, TEXAS, et al.,

Defendants-Appellees.

No. 82-1565.

United States Court of Appeals,

Fifth Circuit.

March 5, 1984.

Suit was brought challenging validity of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district." The United States District Court for the Northern District of Texas, Robert W. Porter, J., entered judgment denying plaintiffs relief, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance could not be challenged under the Act, and (2) zoning ordinance was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis.

Affirmed in part and reversed and remanded in part.

1. United States — 82(2)

Zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" could not be challenged under the Act. 31 U.S.C.A. § 6716.

2. Constitutional Law — 213.1(2)

Three degrees of scrutiny are applied by courts in analyzing statutes challenged under equal protection clause: if a legislative classification disadvantages a "suspect class" or impinges upon exercise of a "fundamental right," then courts will employ strict scrutiny and statute must fall unless government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest; if the classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties, it will be treated under intermediate scrutiny and satutory classification must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand such scrutiny; if neither strict nor intermediate scrutiny is appropriate, then statute will be tested for mere rationality. U.S.C.A. Const.Amend. 14.

3. Constitutional Law — 242.1(5)

Mentally retarded persons are a "quasi-suspect" class and laws discriminating against the mentally retarded should be given intermediate scrutiny. U.S.C.A. Const.Amend. 14.

4. Constitutional Law — 228.2

Zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis. U.S.C.A. Const.Amend. 14.

5. Constitutional Law — 42.2(2)

Organization which aimed to improve welfare and treatment of the mentally retarded, which never identified any individuals who actually desired to live in mental retardates' group home and which failed to prove a sufficient injury to its own interests, lacked standing to challenge constitutionality of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house

district" in its own right or as a representative of its members.

Renea Hicks, Advocacy, Inc., Austin, Tex., for plaintiffs-appellants.

Earl Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

The segregation of one group from the rest of society has been the historical benchmark of unfair discrimination in this country. Such segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions. Thus, blacks were unable to disprove racist stereotypes so long as they were excluded from white neighborhoods and their children were isolated in segregated schools.

Moreover, the effects of such segregation are especially pernicious when the outcast group lacks the political power to resist unfair categorization. Courts have carefully scrutinized legislation that discrimantes against politically impotent groups, for under those circumstances the danger is great that the statute will reflect and enshrine untrue stereotypes.

In the present case, we are faced with the isolation of just such a group — the mentally retarded, i.e. persons who possess certain learning disorders[1] but who are to be dis-

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[1]As an expert, Dr. Phillip Roos, stated at trial:

> A: Essentially mental retardation is a problem of learning. It is manifested particularly in difficulty with abstract thinking, judgment and problem solving and includes social adjustment and economic productivity.

tinguished from the "mentally ill."[2] A zoning ordinance of Cleburne, Texas, excludes mental retardates' group homes from the permitted uses in the "apartment house district."

Q: How do you decide if a person is mentally retarded?

A: We use basically three criteria: Measured intelligence, adaptive behavior and medical classification.

. . . . . .

Q: Are there different degrees or levels of mental retardation?

A: Very definitely. There is a wide variability among retarded individuals. The mildest level of mental retardation, referred to as mild mental retardation, these are individuals whose intelligence is roughly between an IQ of 50 and an IQ of 70. This includes approximately eighty-nine percent of all mentally retarded people. Roughly nine out of ten mentally retarded people are mildly retarded.

Moderate mental retardation, IQ's of roughly 35 to 50, include six percent of the population. Severe mental retardation, IQ's 20 to 35, profound mental retardation, IQ below 20, these two categories combined include only about five percent of the population.

Trial Transcript at 137-38, 140.

[2]Dr. Roos also explained that mental retardation is not a mental illness.

Q: Is mental retardation a type of mental illness?

A: No, sir. It's an entirely different condition requiring entirely different approaches.

Q: Well, how do they differ?

A: Mental retardation is a problem of a deficit in intellectual development and social adaption. Its onset is sometimes from birth or during childhood. It is primarily an educational type of problem. And, traditionally it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition.

Mental illness, on the other hand, is a disorder of thinking, of emotions and of behavior. It can occur anytime in life, often after a period of normal development. It is primarily a psychiatric, rather than an educational problem, and often it is reversible. That is, it is potentially curable in many cases.

Trial Transcript at 138-139.

The owners of a proposed group home challenged the ordinance under the Federal Revenue Sharing Act and the Equal Protection Clause of the Fourteenth Amendment. We reject the Revenue Sharing Act claim, because zoning was not a "program or activity" receiving federal funds. In evaluating the Equal Protection claim, we hold that mental retardates constitute a "quasi-suspect" class; and, therefore, we test the ordinance according to the "intermediate" level of scrutiny established by the Supreme Court. Because the city has failed to prove that the ordinance substantially furthers a significant governmental interest, we hold that the ordinance violates the Equal Protection Clause.

I. FACTS

In July, 1980, Jan Hannah purchased a house at 201 Featherston Street in Cleburne, Texas. Hannah is the Vice President and part-owner of Cleburne Living Centers, Inc. ("CLC"), a Texas corporation organized for the purpose of establishing and operating supervised group homes for the mentally retarded. Hannah bought the Featherston house for the purpose of leasing it to CLC for the operation of a group home, classified as a Level I Intermediate Care Facility.

The home would house thirteen men and women who are mildly or moderately retarded. They would receive twenty-four hour supervision from CLC staff members, working eight-hour shifts. In addition to handling some cooking and cleaning, the staff would work with the mentally retarded residents to train them in such skills as "kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities."[3] An interdisciplinary team of staff workers would prepare an indi-

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[3] *Cleburne Living Center v. City of Cleburne*, No. CA 3-80-1576-F, slip op. at 7, Finding 23 (N.D.Tex. April 16, 1982).

vidualized program for each resident, based on his or her particular needs. The residents would have jobs in the community and in a work activity center. They would probably not have private cars. Their stay at the home would be voluntary, and the length of the stay indeterminate.

As a Level I Intermediate Care Facility, the Featherston home would be subject to extensive regulations and guidelines established and administered by the United States Department of Health and Human Resources, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health. CLC plans to comply with all applicable and valid statutes, regulations, codes, and ordinances. *Cleburne, supra* note 3, at 6, Finding 20.

For mentally retarded persons living in the 1980's, the existence of group homes is critical to assimilation into the normal culture. As the trial court found,

> Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Cleburne Living Center v. City of Cleburne, supra note 3, at 9, Finding 30. At present, there are no group homes or hospitals for the mentally retarded in Cleburne. One is located in Keene, Texas, approximately 15 minutes by automobile from Cleburne.

II. THE ORDINANCE

Section 8 of Cleburne's zoning ordinance lists the permitted uses in a district zoned R-3:

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.

3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels.
6. *Hospitals*, sanitariums, nursing homes *or homes for* convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts.
7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
8. Philanthropic or eleemosynary institutions, other than penal institutions.
9. Accessory uses customarily incident to any of the above uses. . . .

Id. at 4, Finding 12 (emphasis added).

Section 16, subdivision 9, of the same ordinance requires that special use permits be obtained for "*hospitals for the* insane or *feeble-minded*, or alcoholic or drug addicts, or penal or correctional institutions" that are to be operated anywhere in the city. *Id.* at 5, Finding 13 (emphasis added). Because the Featherston house is located in an R-3 zone and, more generally, because it is located anywhere within Cleburne, its use as a group home is not automatically permitted but requires a special use permit from the Cleburne City Council. Under the zoning ordinance, each special use permit is valid for only one year; so the owners of the Featherston house would have to reapply year after year.

III. PROCEEDINGS BELOW

On July 28, 1980, Hannah applied for a special use permit. The Cleburne Planning and Zoning Commission held a hearing and denied the permit. On October 14, 1980, the City Council of Cleburne held a public hearing on the permit application and again voted (3-1) to deny the permit. The Council members considered the following factors:

1. the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston;

2. the location of a junior high school across the street from 201 Featherston;

3. concern for the fears of elderly residents of the neighborhood;

4. the size of the home and the number of people to be housed;

5. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

6. the home's location on a five hundred (500) year flood plain; and

7. in general, the presentation made before the City Council.

After exhausting administrative remedies, Hannah and the CLC sued for injunctive relief and damages, in the United States District Court for the Northern District of Texas. They were joined by the plaintiffs Johnson County Association for Retarded Citizens (JCARC) and Advocacy, Inc. in asserting the constitutional rights of mentally retarded persons who were potential residents of the facility. JCARC is an organization that aims to improve the welfare and treatment of the mentally retarded. Advocacy, Inc. is a nonprofit corporation that provides legal services to developmentally disabled persons.

The defendants in the suit include the City of Cleburne and individual city employees and council members. After a bench trial, the district judge entered judgment denying the plaintiffs relief on each of the grounds they had claimed. This appeal follows.

IV. ISSUES ON APPEAL

The plaintiffs raise various challenges to the zoning ordinance on its face and as applied. They argue, first, that the ordinance and the special use permit denial violate the Revenue Sharing Act which prohibits discrimination against "otherwise qualified" handicapped people. 31 U.S.C.

§ 1242(a) (1) (1982), *recodified* at 31 U.S.C.A. § 6716(b) (2) (1983).

The plaintiffs also claim that the ordinance and its application violate the Equal Protection and Due Process clauses of the Constitution.[4] We find the Revenue Sharing Act claim unconvincing in the circumstances of this case. However, we hold that the Cleburne ordinance, both on its face and as applied, denies equal protection. Therefore, we need not address the other constitutional claims. The one tangential issue that is worthy of note is the defendants' argument that JCARC lacks standing to prosecute this suit. Given the specific facts of this case, we agree. That determination does not affect our decision on the merits, however, for the other plaintiffs remain in the suit.

V. REVENUE SHARING ACT

[1] The plaintiffs argue, first, that the zoning function of the Cleburne City Council is within a "program or activity" subject to the provisions of the Revenue Sharing Act. 31 U.S.C.A. § 6716 (1983). We disagree. As the trial court held, clear and convincing evidence proved that federal funds were not used to finance the zoning activities of the City Council. *See* 31 U.S.C.A. § 6716(c) (1); *see also North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 1926, 72 L.Ed.2d 299 (1982) ("program or activity" language in Education Amendments of 1972 makes their coverage program-specific); *Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir.1981) (receipt of federal financial assistance by

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[4]The plaintiffs assert that the ordinance violates Due Process in two ways. The distinctions drawn in the statute are allegedly arbitrary and capricious, thus failing to meet the minimal rationality requirements set out in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). Moreover, the plaintiffs allege that the statute is unconstitutionally vague. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

multiprogram entity, for application to certain programs or activities, does not bring entire entity within the reach of Section 504 of the Rehabilitation Act); *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir.1969) (multiple programs in Title VI context).

The plaintiffs claim, however, that the City Council itself is an activity receiving federal funds, because it decides which specific city programs will ultimately receive the monies. Therefore, every action of the City Council (including zoning) is subject to the requirements of the Revenue Sharing Act. *Cf. Grove City College v. Bell*, 687 F.2d 684 (3d Cir.1982), *cert. granted* ..... U.S. ....., 103 S.Ct. 1181, 75 L.Ed.2d 429 (1983) (entire college a "program or activity" in Title IX case). We are not willing to make that leap in the circumstances of the case. Even if we assume that the City Council's function in disbursing funds subjected those decisions to the Revenue Sharing Act, there was no apparent link between that function and the Council's function in making zoning decisions. These were two entirely separate powers and should be considered separate programs.

We do not hold that a City Council could *never* be a single program or activity. We merely hold that those conditions do not exist in this case.[5]

VI. EQUAL PROTECTION

[2] The real problem with the Cleburne ordinance is that it denies equal protection both facially and as applied. In recent years, the formulaic analysis of Equal Protection

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[5]This case is distinguishable from *Grove City College, supra,* where the college was considered a single "program or activity" under the Educational Amendments of 1972 because students received federal tuition aid. The aid, which was not earmarked for any specific program, 687 F.2d at 696-97, would conceivably have ultimately funded every program in the college; but the case reveals no attempt by the school to prove that certain programs were not funded. Instead, the college argued that the funding was indirect, going to students rather than any program of the college itself. *Id.*

claims has produced three degrees of scrutiny for courts to apply in analyzing challenged statutes. The levels are generally called "strict scrutiny," "intermediate" or "heightened" scrutiny, and "rational review," *see Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2394-96, 72 L.Ed.2d 786 (1982); the choice among the three levels depends upon the nature of the statute in question. If the legislative classification disadvantages a "suspect class"[9] or impinges upon the exercise of a "fundamental right," then the courts will employ strict scrutiny. *Plyler v. Doe, supra*, 102 S.Ct. at 2394-95 and nn. 14, 15. The statute must fall unless the government can demonstrate that the "classification has been precisely tailored to serve a compelling governmental interest." *Id.* at 2395.

If the "classification, while not facially invidious, nonetheless give[s] rise to recurring constitutional difficulties," *id.*, it will be tested under intermediate scrutiny. Such difficulties arise, for example, when a statute discriminates against a class which shares some of the characteristics of the suspect classes. *See id.* at 2395-97; *Trimble v. Gordon*, 430 U.S. 762, 767, 97 S. Ct. 1459, 1463, 52 L.Ed.2d 31 (1977); Tribe, *American Constitutional Law*, 1090 (1978). To withstand intermediate scrutiny, the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976); *see also Plyler v. Doe, supra*, 102 S. Ct. at 2395, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978).

If neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality. We "seek only the assurance that the classification at issue bears

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[9]The courts have identified a number of classifications as inherently suspect. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (classification by race); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948) (national origin); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage).

some fair relationship to a legitimate public purpose." *Plyler v. Doe, supra,* 102 S.Ct. at 2394.

[3] In deciding the appropriate level of scrutiny in this case, we note that the plaintiffs have identified no fundamental rights that are impaired by the Cleburne ordinance. Our analysis, then, is limited to whether the class of mentally retarded persons is suspect or at least possesses sufficient characteristics of a suspect class to warrant intermediate review.

Although some district courts have discussed this issue,[7] we can find no appellate opinions directly deciding the proper characterization of mentally retarded persons for Equal Protection analysis.[8] Therefore, we face the issue as one of first impression.

The courts have identified several indicia of the suspect classes. In *San Antonio Independent School District v.*

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[7]See *Association for Retarded Citizens of North Dakota v. Olson,* 561 F.Supp. 473, 490 (D.N.D. 1982) (intermediate scrutiny appropriate for classification discriminating against mentally retarded persons); *Fialkowski v. Shapp,* 405 F.Supp. 946, 957-59 (E.D.Pa. 1975) (same) (dictum); *cf. Frederick L. v. Thomas,* 408 F.Supp. 832, 836 (E.D.Pa.1976) (classification discriminating against learning disabled should be tested under intermediate scrutiny) *(dictum). But see New York State Assoc. for Retarded Children v. Rockefeller,* 357 F.Supp. 752, 762 (E.D.N.Y.1973) (inmates of state institution for mentally retarded not a suspect class); *Developmental Disabilities Advocacy Center v. Melton,* 521 F.Supp. 365, 371 (D.N.H. 1981) (same); *Anderson v. Banks, 520 F.Supp.* 472, 512 (S.D.Ga. 1981) (mentally retarded persons not a "quasi-suspect" class). Some cases have discussed whether mentally *ill* persons are a suspect or "quasi-suspect" class. *See, e.g., Doe v. Colautti,* 592 F.2d 704, 710 (3rd Cir. 1979) (mentally ill not a suspect class); *Sterling v. Harris,* 478 F.Supp. 1046, 1056 (N.D.Ill.1979), *rev'd other grounds sub nom; Schweiker v. Wilson,* 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981) (mentally ill a "quasi-suspect" class). However, mental illness is distinguishable in significant ways from mental retardation, as we discuss *infra* at note 10. Thus, the mental illness cases offer at best only weak analogies to the case at bar.

[8]*Romeo v. Youngberg,* 644 F.2d 147, 163 n. 35 (3rd Cir. 1981) *(en banc)* does suggest, however, that mentally retarded persons

Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973), the Supreme Court considered whether

> the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Accord, Plyler v. Doe, supra, 102 S.Ct. at 2394-95 n. 14; *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1964); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed. 1234 (1938). In *Plyler v. Doe, supra*, the Court also noted that

> [s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.

102 S.Ct. at 2394-95 n. 14.

Finally, if membership in the minority class is immutable, the Supreme Court is more likely to give the class special protection. *See Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269 (1979); *cf. Plyler v. Doe, supra*, 102 S.Ct. at 2396 (minor children of illegal aliens are not in this country voluntarily and, therefore, are not comparably situated to their parents).

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might be a "discrete and insular" minority deserving heightened scrutiny. See *infra* at 14. *Cf. Abrams v. 11 Cornwall Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (discrimination against mentally retarded persons is invidious).

Applying these tests to the case at bar, we conclude that although mental retardates are not a suspect class, they do share enough of the characteristics of a suspect class to warrant heightened scrutiny. Discrimination against the mentally retarded is likely to reflect deep-seated prejudice. They have been subjected to a history of unfair and often grotesque mistreatment. Until the 1970s, they were universally denied admittance into public schools in the United States. In addition, the Eugenic Society of America fought during the first half of this century to have retarded persons eradicated entirely through euthanasia and compulsory sterilization. *See Pennsylvania Assoc. of Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294 (E.D.Pa. 1972). Euthanasia was rejected; but thirty-two states have had statutes providing for the sterilization of retarded individuals. *Id.* at 294 n. 42; *Falkawski v. Shapp*, *supra* note 7, at 959 n. 9; O'Hara & Sanks, Eugenic Sterilization, *45 Geo.L.J. 30* (1956); *see also Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) (upholding Virginia compulsory sterilization law.)[9]

Mental retardates have been segregated in remote, stigmatizing institutions. *Cleburne Living Center v. City of Cleburne*, *supra* note 3, at 3, Finding 32, Trial Transcript at 142; and when permitted in society, they have often been subjected to ridicule, *id.* at 141. Once-technical terms for various degrees of retardation — e.g. "idiots," "imbeciles," "morons" — have become popular terms of derision.

These forms of mistreatment have perpetuated the historical misunderstanding of mental retardation and led to popular fears and uncertainty. The Cleburne ordinance

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[9]The attitude of the past can be read in the words of Justice Holmes:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange indeed if it could not call upon those who sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence . . . Three generations of imbeciles are enough.

Id. 274 U.S. at 207, 47 S.Ct. at 585.

discriminates between the mentally retarded and other groups — e.g. the elderly — that also require supervision but may establish group homes in the R-3 district without a special use permit. This distinction is likely to reflect the deep-seated historical prejudice against the mentally retarded.

In addition, mentally retarded persons have lacked political power. The trial court found that they "historically have been subjected to exclusion from the political process. . . ." *Cleburne, supra* note 3, at 9, Finding 32. Indeed, as of 1979, most states disqualified mentally retarded individuals from voting. Note, *Mental Disability and the Right to Vote*, 88 *Yale L.J.* 1644 (1979).[10] Furthermore, political organizations for the mentally retarded have emerged only recently and still possess relatively little power. As the Third Circuit declared in *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir.1981) (*en banc*):

> The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom

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[10]In Texas, both the state constitution and election code provide: The following classes of persons shall not be allowed to vote in this state, to wit:

. . . . .

Second: Idiots and lunatics.

Tex. Const. art. VI, § 1; Tex.Elec.Code Ann. art. 5.01 (Vernon Supp 1982). A 1982 opinion of the Texas Secretary of State limited that language to mentally retarded persons who have been adjudicated incompetent. Election Law Opinion DAD-27 (1982). The opinion relied in large part on the Mentally Retarded Persons Act of 1977, Tex.Rev.Civ.Stat.Ann. art. 5547-300, § 2(c) (Vernon Supp. 1982).

We do not believe, however, that the mentally retarded have suddenly become politically powerful in Texas. They are still a relatively small bloc, notwithstanding the existence of organizations like the Johnson County Association of Retarded Citizens. Moreover, their right to vote was unclear as late as 1982. The Secretary of State opinion was necessitated by a local judge's decision to bar from the polls a mentally retarded person who had not been adjudicated incompetent. *Id.* The powerlessness of the minority is especially clear in our case, for the Cleburne Ordinance was passed in 1965, long before the Secretary of State Opinion or the Mentally Retarded Persons Act.

> the judiciary should exercise special solicitude. *Cf. United States v. Carolene Products*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed.2d 1234 (1938). The retarded cannot vote in most states and, with few community ties, sponsors or friends, have minimal impact on the political process. *See J. Ely, Democracy and Distrust*, 135-79 (1980).

Id. at 163 n. 35.

Finally, the mentally retarded deserve special consideration because their condition is immutable. Dr. Phillip Roos explained at trial that mental retardation is "irreversible." "[T]here may be some amelioration, but to date it is not a curable condition." Trial Transcript at 139.

The combination of these factors — historical prejudice, political powerlessness, and immutability — calls for heightened scrutiny of classifications discriminating against the mentally retarded. We are not prepared to say that they are a full-fledged suspect class, however. Strict scrutiny has been reserved for classifications, such as race, that "tend to be irrelevant to any proper legislative goal." *Plyler v. Doe*, *supra* 102 S.Ct. at 2394-95 n. 14. Though mental retardation is irrelevant to many policies, it *is* a relevant distinction in some cases. For example, learning difficulties may have a bearing on the types of school programs to which a child is assigned or the types of employment for which an adult is qualified. Therefore, we hold that mentally retarded persons are only a "quasi-suspect" class and that laws discriminating against the mentally retarded should be given intermediate scrutiny.[11]

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[11]In deciding that classifications against the mentally retarded deserve heightened scrutiny, we express no view about classifications involving the mentally ill. Some courts and commentators have suggested that mentally ill persons are a suspect or quasi-suspect class. See, *e.g.*, *Sterling v. Harris*, *supra*, 478 F.Supp. at 1053; Note, *Mentally Illness: A Suspect Classification*, 83 Y.L.J. 1237 (1974); but *see Doe v. Colautti supra*. The Fifth Circuit has not addressed this issue, except to say in *dictum* that the mentally ill are not a suspect class. See *Benham v. Edwards*, 678 F.2d 511, 515

We note that heightened scrutiny is particularly appropriate in the case at bar, because the Cleburne ordinance as applied withholds a benefit which, though not fundamental, is very important to the mentally retarded. See *Plyler v. Doe*, *supra*, 102 S.Ct. at 2398; *Tribe*, *supra* at 1089-90. In *Plyler*, the Supreme Court addressed a Texas statute which withheld from local school districts any funds for the education of children who were not legally admitted into the United States. The statute also authorized local disricts to exclude such children from the public schools. 102 S.Ct. at 2389. The Court held that heightened scrutiny was appropriate not only because the children shared some of the characteristics of a suspect class, but also because they were denied an important benefit. Education is not a fundamental right, *id.* at 2397, *San Antonio Independent School District v. Rodriguez*, *supra*, 93 S.Ct. at 1297; but it is important in helping such children overcome the bias against them and participate in American society:

> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic

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n.9 (5th Cir. Unit B 1982). The Court explicitly declined to decide whether intermediate scrutiny would be appropriate. *Id.*

In any event, mental retardation is functionally different from mental illness; see *supra* note 2; and the differences cut in favor of heightened scrutiny for the retarded. Mental retardation is not an emotional disorder but a learning problem; it arguably invokes fewer safety concerns than does mental retardation. More important, mental retardation, unlike many mental illnesses, is an immutable disorder. Then mentally retarded cannot be cured. *Id.*

Finally, mental illness covers a broader spectrum of disorders and is more difficult to define than mental retardation. The court in *Doe v. Colautti*, *supra*, 592 F.2d at 711, refused to grant extraordinary protection to the mentally ill:

> a class that is "large, diverse, [and] amorphous. . . ." The concept of mental illness is susceptible to much dispute, and the category encompasses a whole range of disorders, varying in character, and effects.

Mental retardation is much more narrowly defined. See *supra* note 1.

> possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

102 S.Ct. 2398.

In the same way, the exclusion of group homes from Cleburne operates to prevent mentally retarded persons from assimilating into and contributing to their society. The trial court found that

> [g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in a community is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Cleburne, supra at 9, Finding 30. Isolated from normal community patterns, they can never hope to adapt. The resulting awkwardness of retarded persons as well as the fact of state-sanctioned isolation further stigmatize the group and provide additional barriers to their hope for self-improvement.

The Ninth Circuit has held in an analogous case that heightened scrutiny is appropriate. *See J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir.1983). The Court reviewed a local zoning ordinance that required a special use permit before the establishment of a group home for former mental patients[12] in the R-2 zone.[13] Intermediate scrutiny was held

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[12]We are not suggesting that former mental patients are identical to the mentally retarded. *See supra* notes 2, 11. However, many of the problems (e.g. the community's fear and distrust) that face mental patients in returning to society are similar to problems faced by the mentally retarded.

[13]The Tacoma ordinance was arguably less problematic than the Cleburne ordinance, because the Tacoma law provided specific conditions for the issuance of a permit. See *id.* at 1130 n.5. The Cleburne ordinance has no guidelines at all.

to be applicable because the class shared some of the characteristics of suspect classes and because the ordinance denied important benefits:

> We note . . . that the benefits the ordinance restricts are the former mental patients' access to housing and rehabilitative services. While they are not fundamental rights, they like education at issue in *Plyler*, are essential to individuals' full participation in society. Indeed, for former mental patients, a reintegration into society accomplished through living, in a moderately structured setting in a residential neighborhood is an essential part of therapy.

Id. at 1129.[14]

For the same reasons, we think that intermediate scrutiny is particularly appropriate in reviewing an ordinance[15] that restricts the availability of group homes for the mentally retarded.

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[14]Incidentally, although the court relied on these arguments to apply heightened scrutiny, it explicitly left open

> the possibility that, in a case with a record more fully developed as to the characteristics and status of former mental patients, a conclusion that they indeed constitute a suspect class might be warranted.
> *Id.* at 1129.

[15]The City has argued that the statute does not actually exclude all such group homes but merely requires one additional procedural hurdle. In effect, there is only a possibility of exclusion. Arguably, than we should not adopt heightened review in testing the *facial* validity of the statute as opposed to its application.

Yet the same possibility *obtained* in both *Plyler* and *City of Tacoma*. The Texas Ordinance in *Plyler* authorized but did not require local school districts to exclude undocumented children. Indeed, the Tyler Independent School District had enrolled such children free of charge until 1977 when it required a tuition fee. 102 S.Ct. at 2389 n. 2. The Court tested the provision, however, with more than minimal scrutiny because of the potential exclusion.

More to the point, the zoning ordinance in *City of Tacoma*, like the Cleburne Ordinance, did not exclude all group homes but merely required a special use permit. The Ninth Circuit tested the statute under intermediate scrutiny again because of the possible denial of an important benefit.

Thus, the possible exclusion here is sufficient to justify our considering the importance of the restricted benefit when we analyze the statute on its face.

[4] In applying that test, we hold that the ordinance is unconstitutional both on its face and as applied. First, the provision itself does not substantially further any important governmental interests. The problem lies not with the interests themselves but with the relevance of the ordinance to those interests. We will assume that all of the legislative goals asserted by the City of Cleburne are substantial. In each instance, however, there is not a sufficiently close correspondence between the goal and the ordinance's means of achieving it. *See Craig v. Boren, supra,* 429 U.S. at 197, 200-204, 97 S.Ct. at 460 (requiring closer fit between legislative objective and statutory means than is required under rational review); Tribe, *supra* at 1083 & n. 10 (same); *see also Trimble v. Gordon, supra,* 430 U.S. at 770-71, 97 S.Ct. at 1465-66; *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 1904 n. 20, 1911 n. 48, 48 L.Ed.2d 495 (1976); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 799-80 n. 13, 39 L.Ed.2d 52 (1974). The standardless requirement of a special use permit for all group homes for the mentally retarded is both vastly overbroad and vastly underinclusive.

For example, the City claims that the objectives of the statute were:

1. to avoid undue concentrations of population;

2. to lessen congestion in the streets;

3. to ensure safety from fire and other dangers; and

4. to protect the health, safety and welfare of the City's population — in particular

   a. to protect the serenity of the existing neighborhoods,

   b. to protect neighbors from harm; and

   c. to protect the mental retardates themselves by providing an appropriate living environment.

See Brief of Appellees at 21-24.

The ordinance is irrelevant to the achievement of the first two asserted objectives. The same house with the same

number of occupants would be a permitted use so long as the occupants were not mentally retarded. *Cleburne*, *supra* note 3 at 7, Finding 24. Therefore the ordinance does not control population at all. It merely controls the learning skills of the population.

The ordinance likewise does not control traffic flow. The government has not shown that mentally retarded persons drive more cars or receive more visitors than other people. There is no basis for concluding that traffic will be any more congested because the residents of the Featherston house are mentally retarded. One might argue (though the City has not taken this position) that traffic would be more congested because mentally retarded persons would wander into the streets. Other people do the same, however; and there is no evidence in the record that mentally retarded persons are unusually prone to cause such a hazard. We reject traffic congestion as a goal that is furthered by the ordinance.

The record also fails to support the claim that the ordinance protects the serenity of neighborhoods and shields neighbors from harm. The City produced only one story of a mentally retarded person who had caused a disruption: he had removed some mail from a neighbor's mailbox but later returned it. Moreover, this event did not even take place in Cleburne. *See* Trial Transcript at 111. Nothing in the record indicates that mentally retarded persons — and particularly those admitted into group homes — are more disruptive or dangerous than other people. On the contrary, Dr. Roos testified that the mailbox incident was not common behavior in moderately retarded persons and was just as possible in most children. *Id.* at 164. Yet public schools and homes for delinquent children are permitted in the zone. The discrimination between the mentally retarded and other persons is not explained by recourse to neighborhood serenity.

Finally, as to "safety from fire and other dangers," the City does not clarify whether mentally retarded persons

will cause the dangers or require special city services when accidents occur. In either event, the City has not proved a substantial relationship between the goal and the ordinance. There is no evidence in the record that mentally retarded persons are more likely than other people to light fires (or cause other hazards). It is conceivable that they might require special care in an emergency. However, the City has never shown that they require more supervision than groups like the elderly whose nursing homes are permitted in the R-3 zone without permits. Nor has the City shown that the existing supervisors in the Featherston house would provide inadequate care. To treat all homes for the mentally retarded as non-permitted uses is an excessively blunt instrument for achieving fire safety. The City could more appropriately solve this problem by requiring a certain number of caretakers per resident or by setting limits on occupancy. Such requirements already exist in federal and state regulations. *See Cleburne, supra* note 3, at 6, Finding 20. There is no reason why the City cannot be more specific in delineating its concerns.

The same objection can be raised to the City's general claim that the ordinance serves to protect the health, safety, and welfare of mentally retarded persons — by insuring, for example, that group homes are well constructed, safely located, and not over-crowded. The City could serve these interests in a much more direct manner by setting specific requirements to guide the judgment of the City Council. The alternative (embodied in the Cleburne ordinance) of giving the city council complete discretion to bar all group homes is too dangerous. There is too great a potential for blanket discrimination, fueled by the very fears and prejudices that drove neighbors in this case to petition the City Council against the Featherston Home. We cannot sanction such unbridled discretion in dealing with a class that has suffered a history of mistreatment and political impotence. The Cleburne provision requiring a special use permit for mental retardates' group homes is facially invalid under the Equal Protection Clause.

That holding alone would be sufficient to decide this case. The ordinance provision was unconstitutional; therefore it could not be invoked to exclude the Featherston Home. However, even if the statute were facially constitutional, the City Council's decision in this case would have violated equal protection. Again, the decision must be tested under intermediate scrutiny; and we hold that the denial of a permit for the Featherston Home did not substantially further any important government interest justifying the discriminatory classification.

The factors going into the Council's decision were:

(a) the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston;

(b) the location of a junior high across the street from 201 Featherston;

(c) concern for the fears of elderly residents of the neighborhood;

(d) the size of the home and the number of people to be housed;

(e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

(f) the home's location on a five hundred (500) year flood plain; and

(g) in general, the presentation made before the City Council.

Cleburne, supra note 3, at 9-10, Finding 34.

The final factor (g) is too ambiguous to justify discrimination; and two more (a and c) do not serve substantial interests. The prejudices and fears of neighbors are not in themselves ligitimate bases for discrimination.

The location of a junior high across the street from the Featherston Home (factor b) raises an arguable concern

that the students would tease or abuse residents of the home. However, that danger seems minimal, since about thirty students are themselves mentally retarded. *Cleburne, supra*, note 3, at 6, Finding 21. More important, the very purpose of living in a community group home is to confront and learn to handle society's obstacles. If we accept that the hostility of junior high students is a substantial concern, then any hostility may become the justification for denying a use permit. In effect, prejudice becomes its own excuse. We cannot accept that as a substantial interest, particularly given the speculative, unsupported nature of the City's allegations.

The size of the home and the number of people to be housed are important interests; but they are not substantially served by denying the permit in this case. The Featherston Home has four bedrooms and two baths and will house thirteen people. The structure contains 2700 square feet and is located on a lot that is 156 feet long by 103 feet wide. Citing a recent Texas regulation that limits group homes to six residents, the City argues that residents of the Featherston Home will be too crowded. The regulation only applies to applications made after May 1, 1982 and, therefore, does not govern the Featherston Home; but the City feels that the regulation indicates the needs of mentally retarded persons. However, the existence of the rgulation does not explain Cleburne's discrimination between the mentally retarded and others. The City never justifies its apparent view that other people can live under such "crowded" conditions when mentally retarded persons cannot. Moreover, assuming that the City would be comfortable with six residents, it has never justified the difference between six and thirteen persons. The only discussion of this question came from Dr. Roos who knew of "no research evidence indicating that a group home with six does a better job than a group home with fifteen." Trial Record at 161. In sum, the City has never proven that the mentally retarded have unusual space needs or that denying the Featherston permit serves that interest.

The stated goal of insuring CLC's legal responsibility for the actions of its residents is not sufficiently important. Nowhere in the briefs or the record do we find an explanation why mental retardates alone must prove their financial solvency to live in Cleburne. Nor do we find any explanation of how CLC fell short.

Finally, the argument that the Home would be in a 500 year flood plan seems somewhat strained. Though the safety of the residents is important, the danger of a flood every five hundred years is not particularly great.

In sum, none of the proffered reasons for denying the Featherston permit substantially served an important government interest. The application of the ordinance denied equal protection.

VII. STANDING OF JCARC

[5] The Johnson County Association of Retarded Citizens has asserted standing to litigate this suit in its own right and as a representative of its members. The trial court held that the association had failed to prove any injury to itself or to its members. Therefore, it failed to satisfy the requirements for standing.

We affirm, for the reason given by the trial court. The JCARC has not shown any injury to its members. Although it claims that some of its members are potential residents of the Featherston Home, it has never identified any individuals who actually desire to live there. Thus, it is impossible to tell if any of the members were actually harmed by the City Council's action. *See Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

Nor has the JCARC proven a sufficient injury to its own interests. The association's activities include "promoting the general welfare of mentally retarded people, fostering the development of programs on their behalf, and advising and aiding parents of mentally retarded persons in the solution

of their problems in this area." Brief of Appellant at 3. In particular, the JCARC favors the development of group homes; and the City Council's decision allegedly impairs this interest. However, the association's interest seems no different from that of the low-income housing association denied standing in *Warth v. Seldin, supra.* The injury to the JCARC's "abstract social interests" is too intangible to justify standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982).

The association would have standing if it proved that (1) it provides counseling and referral services for mentally retarded persons seeking group homes, and (2) it has had to devote significant resources to combatting the City Council's discrimination. *Id.* However, it has not yet proven any drain on its resources, so it does not come within the *Havens* formula.

In future cases, the JCARC can put forth evidence proving such an injury, or it can show that one of its members actually desires to live in the contested group home.[18]

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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[18]Admittedly, we have provided the JCARC with a formula for establishing standing in its future litigation. There is high precedent for giving such advice. See *Sierra Club v. Morton, supra*, 92 S.Ct. at 1366.

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs-Appellants,

v.

CITY OF CLEBURNE, TEXAS, et al.,
Defendants-Appellees.

No. 82-1565.

United States Court of Appeals, Fifth Circuit.

July 6, 1984.

Renea Hicks, Advocacy, Inc., Austin, Tex., for plaintiffs-appellants.

Earl Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 1984, 5 Cir., 1984, 726 F.2d 191)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge, with whom BROWN, GEE, REAVLEY, JOLLY and DAVIS, Circuit Judges, join, dissenting.

I respectfully dissent from the denial of a rehearing en banc.

The panel has made a holding no other federal appellate court has: that state regulations treating the mentally retarded differently than others are on that account facially invalid if they fail to meet the "intermediate" or "heightened" scrutiny test applicable to classifications such as those based on gender or legitimacy, notwithstanding that the regulatory distinctions in question are rationally based and impair no fundamental right.[1] I believe this holding not only to be significantly wrong, but also, due to its exceptional importance and novelty, to clearly deserve our en banc consideration.

It is both a cliche and a fundamental truth that equality does not demand treating materially different conditions in the same manner. Hence, where fundamental rights are not concerned, a threshold requirement for scrutiny beyond the rational basis level should be that the group singled out for special treatment be not generally, or with respect to the field of regulatory subject matter under consideration, significantly different, as a result of its defining characteristics, from the rest of society in terms of its needs and abilities to function. Where difference in treatment should rationally be expected, it is indeed an ill-advised rule that treats its presence as quasi-suspect.

Classification based on mental retardation is generically different from that based on gender or legitimacy, the prototypical "quasi-suspect" classifications. Under the broadly held and judicially accepted view, women and illegitimates are not generally different from the rest of society in terms of their needs and abilities to function. Women have as much need for, and ability to benefit from, the same kinds

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[1]The district court held the regulatory distinctions here at issue to be rationally based. The panel did not reach that question, and hence neither does this dissent, which is directed only to the rule announced by the panel. The panel likewise held there was no impairment of fundamental rights.

of education as men,[2] and illegitimate children have as much need for, and can equally benefit from, parental support as legitimate children. Thus, for example, governmental distinctions between the sexes respecting education, or between legitimate and illegitimate children respecting the obligation of parental support, are quasi-suspect. The mentally retarded present a wholly distinct situation.[3] They *are* materially different from the rest of society, and are so as a result of their class-defining characteristics.

The characteristics which define the retarded as a class — the presence from birth or early childhood of an incurable, though ameliorable, significant deficit in intellectual development and social adaptation — bear heavily on the individual's needs and abilities to perform or contribute to society over an extremely wide range of functions, and are highly relevant to proper legislative goals in most respects.

And, in respect to the appropriate living, caring, and educational environment, the general subject under consideration here, the retarded are meaningfully different not only from nonretarded generally but also from other groups for which special arrangements in these respects are often made: the very young, the very old, the mentally or physically ill. This, of course, was recognized by plaintiffs' expert in the present case in his testimony quoted in the panel opinion (note 12) that mental retardation and mental illness are "conditions requiring entirely different approaches." It is likewise obvious that entirely different approaches are also required in respect to the retarded and

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[2]The same may be said with respect to legal and illegal alien children.

[3]As observed in *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973):

> ". . . what differentiates sex from such *nonsuspect statuses* as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the *sex characteristic frequently bears no relation to ability to perform or contribute to society.*" (Empasis added.)

the very young, or the very old, or the physically ill. Clearly that, too, is recognized by the plaintiffs here, who seek to create an environment *restricted* to and specifically designed for the retarded. Plaintiffs here do not want a children's day-care facility or a hospital. The retarded, *as such*, are not hospitalized or placed in nursing homes. In short, the retarded, often with minds at or below third-grader level in the bodies of otherwise relatively healthy adults, present a *special* set of needs, requirements, and problems unique to their condition.

As "entirely different approaches"are required respecting the retarded, are we nevertheless to treat the presence of difference in approach as "quasi-suspect"? It is entirely too facile to suggest that we do so only when the difference disadvantages the retarded. Is it an "advantage" or a "disadvantage" to be under twenty-four-hour supervision by professional staff (as the panel opinion reflects is the plan for the proposed facility here)? That may often depend on whether or not the person supervised is retarded. If so, the issue is not so much one of equality, but of *entitlement* to special, particular treatment. Moreover, some may think a given distinction helpful to the retarded, others not. Is the decision to apply "heightened" scrutiny dependent on whether the majority of "experts" think the distinction helpful to the retarded? Are all states frozen in the current "majority" view? If so, is innovation then "quasi-suspect"?[4] Are we to review as "quasi-suspect" the failure of govern-

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[4]In Justice Brandeis' famous words: "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). The panel opinion appears to regard the integrative model as the preferred method of aiding the retarded. *See* At 199 ("Isolated from normal community patterns, they can never hope to adapt."). Are other models constitutionally "quasi-suspect"?

mental facilities for the retarded to have every item of equipment or design characteristic found in municipal hospitals or to require staff educational attainments mandated for the hospitals? How are funding levels to be compared? Obviously, these observations suggest only the smallest fraction of the myriad of areas in which governmental practices may distinguish between the retarded and the nonretarded, but where judgment as to the constitutional validity of a given distinction made on that basis is not meaningfully aided by asking whether the distinction is advantageous to the retarded.

The factors relied on by the panel for its determination that the retarded are a quasi-suspect class[5] should not alone suffice for such purpose, absent the class' meeting a threshold level of lack of significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of its member's needs and abilities to function, either generally or in respect to the regulatory area under consideration. The panel factors in no way mitigate the contradictory nature of "quasi-suspecting," as being unequal, the different treatment of conditions that are significantly different. Indeed, the panel factors tend to increase in strength with the degree of retardation and the concomitant increased appropriateness of disparate treatment.[6] Where

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[5]The factors cited by the panel (At 197-98) may be summarized as follows: (1) "likely to reflect deep-seated prejudice"; (2) "history of unfair and often grotesque mistreatment," including "universally denied admittance into public schools" (until 1970's), segregation "in remote, stimatizing institutions," and "often been subjected to ridicule"; (3) "have lacked political power"; (4) "their condition [through ameliorable] is immutable."

[6]I believe it fair to assume that, to the extent the public tends to react toward the retarded differently than toward the nonretarded, the differences in reaction are greatest with respect to those whose retardation is more pronounced, and least with respect to the marginally retarded (those with, say, an IQ at or only slightly below 70). Certainly, the marginally retarded are far more likely to attend public schools, and far less likely to be "in remote,

the need for greater differences in treatment is most evident — the severely and profoundly retarded — the classification is the most suspect.

State regulations will inevitably often distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the same test that we use to invalidate distinctions based on gender, constitutes in my view a major and unwarranted extension of federal judicial power, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded. Before we thus expand our own powers I believe the states, and those charged with the legislative and executive functions, should at least be afforded a review en banc.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom JOHN R. BROWN, Circuit Judge, joins, specially concurring in the dissent:

I join the dissent from the denial of en banc rehearing. I share the concerns so well expressed by Judge Garwood's dissent, but it is not necessary to reach a final judgment without the benefit of oral argument and collegial effort and I stop short of doing so. Only the case for en banc consideration need now be made and the dissent has done that. We have recently been willing to convene en banc solemnly to deliberate diversity cases whose vitality wholly depends on the next state court decision. *Sturgeon v. Strachan*

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stigmatizing institutions," than those with more pronounced retardation. In terms of their ability to be trained so as to increase their social adaptive behavior to approach minimal levels necessary to function in society, the condition of the marginally retarded is certainly less "immutable" than that of those whose retardation is more pronounced. With respect to political power, the marginally retarded are more likely to vote (*see* panel opinion, note 10).

Shipping Co., 731 F.2d 255, 260 (5th Cir.1984) (en banc) (Rubin, J., dissenting); *Edwards Co. v. Monogram Industries, Inc.*, 730 F.2d 977, 987 (5th Cir.1984) (en banc) (Rubin, J., concurring). I am puzzled, then, that a case which implicates government's relationship with a uniquely insular minority and reexamines the relative roles of federal and state governments and their branches in their superintendence would not be deemed by a majority of this court worthy of en banc consideration.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1565

D. C. Docket No. CA3-80-1576 F

CLEBURNE LIVING CENTER, INC., et al.,

Plaintiffs-Appellants,

versus

CITY OF CLEBURNE, TEXAS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, reversed in part and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

MARCH 5, 1984

ISSUED AS MANDATE: JULY 16, 1984

U.S. District Court
Northern District of Texas
FILED
Aug. 27, 1984
Gilbert F. Ganucheau,
Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1565

CLEBURNE LIVING CENTER, INC., et al.,
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versus

CITY OF CLEBURNE, TEXAS, et al.,
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Appeal from the United States District Court for the Northern District of Texas

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ORDER:

☐ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 27, 1984 the stay to continue in force until the final disposition of the case by the Supreme Court, provided

that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of .....
for a further stay of the issuance of the mandate is GRANTED to and including .....,
under the same conditions as set forth in the preceding paragraph.

☐ The motion of .....
for a further stay of the issuance of the mandate is DENIED.

CHARLES CLARK
CHIEF JUDGE

MDT-4